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No. 11691 2480

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O'SULLIVAN,

Appellant,

vs.

TIGHE E. WOODS, Acting Housing Expediter,
Office of Housing Expediter.

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
SEP 1947

PAUL F. BARNES, JR.
CL

No. 11691

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O'SULLIVAN,

Appellant,


VS.

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

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F. E. FUHRMAN,

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San Francisco, California,

Attorney for Plaintiff and Appellee.

Before: The Honorable Leon R. Yankwich,
sitting without a jury.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26257 R

PAUL A. PORTER, Administrator, Office of Price
Administration,

Plaintiff,

vs.

JOHN O'SULLIVAN, 1235 Filbert Street, San
Francisco, California,

Defendant.

COMPLAINT FOR INJUNCTION AND
TREBLE DAMAGES

Rent Regulation for Housing

Count I.

1. In the judgment of the Administrator the defendant engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, (hereinafter called the Act) which actions and practices consist of violations of the Rent Regulation for Housing (8 F. R. 14663) issued in accordance with the provisions of Section 2(b) of the Act; and, therefore, the Administrator brings this action pursuant to Section 205(a) of the Act to enforce compliance with said Section 4(a). Jurisdiction of this action is conferred upon the court by Section 205(c) of the Act.

Overcharges

2. The Rent Regulation for Housing, establishing maximum rents for the use and occupancy of housing accommodations, has been in effect in the San Francisco Bay Defense Rental Area at all times herein mentioned. Defendant, is landlord of certain accommodations subject to said Regulation, within said Area, including the housing accommodations at 2510 Central Avenue, Alameda, Calif.

3. Since July 1, 1942, defendant demanded and received rents higher than the maximum rents permitted by said Rent Regulation for the use and occupancy of such accommodations. More than thirty days have elapsed since the occurrence of the aforesaid overcharges and the tenants so overcharged have not instituted any action for damages on account of such overcharges, pursuant to Section 205(e) of the Act.

Wherefore, the Administrator demands:

1. A Preliminary and Final Injunction enjoining the defendant, his agents, employees and all persons in active concert or participation with them, from directly or indirectly:

(a) Demanding or receiving rents in excess of the maximum rents permitted by the Rent Regulation for Housing, as heretofore or hereafter amended, or in excess of the maximum rents permitted by any other Regulation or order heretofore or hereafter adopted pursuant to the Emergency Price Control Act of 1942,

as heretofore or hereafter amended or extended; or from otherwise violating said Regulation as heretofore or hereafter amended, or any other regulation relating to rents heretofore or hereafter adopted pursuant to said Act as heretofore or hereafter amended or extended.

(b) Removing or attempting to remove or threatening to remove any tenant from any housing accommodations, contrary to the provisions of said Rent Regulation for Housing.

2. A Preliminary and Final Injunction requiring the defendant to:

(a) File with the Administrator, Registration Statements in the form prescribed by the Administrator, correctly setting forth the maximum rent heretofore or hereafter established for defendant's housing accommodations rented or offered for rent.

(b) Exhibit to new tenants to whom defendant's housing accommodations are rented, the landlord's copy of the Registration Statement for such housing accommodations, and to secure the signature thereon of each new tenant, and to file with the Administrator within five days notice of such change in tenancy.

(c) Give to each new tenants of defendant's housing accommodations full and complete receipts for any sums received as rent for defendant's housing accommodations.

(d) Restore and maintain continuously all services, furniture, furnishings and equipment

required to be furnished to each tenanat of defendant's housing accommodations in accordance with the provisions of the Rent Regulation for Housing, as heretofore or hereafter amended.

3. Judgment in favor of the Administrator on behalf of the United States of America and against the defendant for 3 times the amount of each overcharge or \$50.00, whichever is greater, as to each tenant so overcharged, and for costs.

Dated Aug. 6, 1946.

W. H. BRUNNER

PAUL FRIEDMAN

PHILIP ADAMS

F. E. FUHRMAN

C. M. SAROYAN

By /s/ F. E. FUHRMAN

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 6, 1946.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes now defendant John O'Sullivan and answering the complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations of Paragraph 2 of Count I, this defendant denies that he is the land-

lord of accommodations located at 2510 Central Avenue, Alameda, California, and in this respect alleges that he has not been the landlord of said premises or owner thereof since March 1945.

II.

Answering the allegations of Paragraph 3 of Count I, this defendant denies each and every, all and singular the allegations therein contained, save and except that defendant admits that no tenants have instituted any action against him pursuant to Section 205(e) of the Act or otherwise.

As and for a Further, Separate and Distinct Affirmative Defense to Plaintiff's Complaint, Defendant Alleges as Follows:

That said action is barred by the provisions of Section 205(e) of the provisions of the Emergency Price Control Act of 1942 as amended.

Wherefore, defendant prays that plaintiff take nothing by his complaint on file herein and that he have judgment in his favor.

CHARLES A. CHRISTIN
THOMAS J. KEEGAN

State of California,
City and County of San Francisco—ss.

John O'Sullivan, being duly sworn, deposes and says:

That he is the defendant named in the above

entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information and belief and as to those matters he believes it to be true.

JOHN O'SULLIVAN

[Seal]

(Verification of Notary)

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 8, 1946.

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 24th day of February, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Michael J. Roche,
District Judge.

ORDER GRANTING MOTION FOR
SUBSTITUTION OF PLAINTIFF

This case came on regularly this day for hearing of motion for substitution of plaintiff. After argument, it is Ordered that said motion be granted.

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 3rd day of March, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Leon R. Yankwich,
District Judge.

TRIAL, JUDGMENT, ORDER DENYING MOTION TO DISMISS COMPLAINT, ORDER DENYING MOTION FOR JUDGMENT IN FAVOR OF DEFENDANT, ORDER DENYING APPLICATION FOR INJUNCTION

This case came on regularly this day for trial before the Court sitting without a jury. F. Fuhrman, Esq. was present on behalf of the plaintiff, and Charles Christin, Esq. was present on behalf of the defendant. Mr. Christin made a motion to dismiss the complaint. Ordered that said motion be denied. Ralph G. Spencer and Ruth Kalen were sworn and testified on behalf of the plaintiff. Mr. Fuhrman introduced in evidence and filed Plaintiff's Exhibits Nos. 1, 2, and 3, and the plaintiff rested. Both sides rested. Mr. Christin made a motion for judgment in favor of the defendant. After hearing the arguments of the attorneys, it is Ordered that said motion be denied. The case was submitted to the Court for decision, and due consideration having

been had, it is Ordered that a judgment be entered in favor of the plaintiff in the sum of \$450.00, \$150.00 of said sum to be paid to the tenant Ruth Kalen. Further Ordered that the application for an injunction be denied. Further Ordered that findings of fact and conclusions of law be prepared in accordance with the rule.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant above named, John O'Sullivan, and moves for a dismissal of the above proceedings on the following grounds:

I.

That Paul A. Porter, Administrator of the Office of Price Administration, is no longer the Administrator of the Office of Price Administration, and that the plaintiff in the above entitled matter is seeking to continue the proceedings herein under the name of a substituted plaintiff, to wit, Philip B. Fleming, and no proper showing has been made under Rule 25 of the Federal Rules of Civil Procedure nor has compliance been made with Section 780, Title 28, U. S. C. A.

II.

That Philip B. Fleming is not a proper party plaintiff in that he holds his office as Temporary Controls Administrator without confirmation by the United States Senate, as provided by law.

III.

That the complaint in the above entitled action is defective and does not state a cause of action for damages as purportedly set forth therein in that there is not pleaded that the rentals alleged to have been demanded and received which were higher than the maximum rents permitted by the Rent Regulations for the use and occupancy of the accommodations took place within one year prior to the institution of the action.

The above motion will be made before the above entitled Court on Monday, March 10, 1947, at 10 o'clock a.m., at the courtroom of the above entitled Court in the Post Office Building, Seventh and Mission Streets, San Francisco, or as soon thereafter as counsel can be heard.

Dated: March 4, 1947.

CHARLES A. CHRISTIN

THOMAS J. KEEGAN

Attorneys for Defendant.

Memorandum of Points and Authorities

I.

Section 780, Title 28, U. S. C. A.

Rule 25, Federal Rules of Civil Procedure

Porter v. Goodwin, 68 Fed. Supp. 949

II.

Porter v. Woodward, U. S. District Court for the Southern District of Oregon, Civil No. 3328

Bowles v. A. R. Johnson, Municipal Court of Long Beach, decided February 4, 1947.

III.

Matheny v. Porter, 158 (2d) 478, 10th Circuit (Receipt of Service)

[Endorsed]: Filed March 5, 1947.

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and forty-seven.

Present: the Honorable Leon R. Yankwich,
District Judge.

ORDER DENYING MOTION TO DISMISS

This case came on regularly this day for hearing of motion to dismiss. After hearing F. Fuhrman, Esq., on behalf of the plaintiff, there being no appearance on behalf of the defendant, it is Ordered that said motion be and the same hereby denied.

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Objections considered and denied. Yankwich, J.

Comes now the defendant and interposes the following objections and suggests the following amendments to the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff.

I.

Finding No. 1 should be deleted as the Court has no jurisdiction under Section 205 (c) and 205 (e) of the Emergency Price Control Act of 1942 as amended, for the reason that the plaintiff Paul A. Porter ceased to be Administrator for the Office of Price Administration and no successor has been legally appointed in his place and stead. Philip B. Fleming sought to be substituted as plaintiff and designated as Administrator of the Office of Temporary Controls has never been properly substituted nor has he qualified nor has he been properly appointed to said office.

The appointment of Philip B. Fleming as Administrator was never confirmed by the United States Senate and there has been no showing made by the plaintiff for the necessity of the substitution pursuant to Rule 25, Federal Rules of Pleadings and Practice. (See also *Porter v. Goodwin* 68 Fed. Sup. 649.)

II.

Finding No. II. There is no evidence to support this finding.

III.

Finding No. IV. There is no evidence to support the finding that "during all of said period the defendant, through his agent and employees, demanded and received from Ruth Kalen the sum of \$75.00 per month . . ." Ruth Kalen testified that she never met the defendant John O'Sullivan and there is no evidence of agency or employment of the person or persons by the defendant O'Sullivan to whom the rent was alleged to have been paid.

IV.

Finding No. V: There is no evidence to support this finding that the defendant did not file the registration statement until March 10, 1945.

V.

Finding No. VI: There is no evidence to support this finding and it should be entirely deleted as the matters therein referred to are not an issue set forth in the complaint and denied in the answer. The complaint does not allege the violation of the order of the Price Administrator dated October 31, 1945. The only violations alleged in the complaint are that the defendant made overcharges. These overcharges, if proven, constitute an entirely different cause of action from the cause of action of gravamen set forth in proposed Finding No. VI.

He could not have been in violation of the order of October 31, 1945, until thirty days thereafter (Porter v. Sandberg, 69 Fed. (2nd) 29 at 31; Porter v. Butts 63 Fed. Supp. 516). The latter referred to case clearly sets up the violation as being the failure and refusal of defendant to make the refund within the time provided and also specifically alleges the mailing of the notice by the Administrator so as to put him on notice in order to charge him for the violation of the order.

The cause of action sought to be set up in this finding is an entirely different cause of action from the one referred to in the complaint. Therefore, the entire finding proposed should be stricken. In this finding there is sought to be found that a copy of the order was mailed to the defendant. There is insufficient evidence for the Court to permit an inference to be drawn or a presumption to arise that this fact exists. The testimony of Mr. Ralph B. Spencer, employee of the Office of Price Administration is that he was Supervising Rent Examiner with thirty girls in the office and the routine was that the copy was mailed to the defendant. The court's attention is called to the fact that the registration shows "1230 Filbert Street, San Francisco, California" to be the address of the owner. There is an apparent change on the registration and the notice itself is alleged to have been mailed to 1235 Filbert Street, San Francisco, California. This is certainly not positive testimony of mailing to the proper address.

Even though this error had not existed the evidence is insufficient to permit this Court to find that the notice which put the defendant in violation was actually mailed. This matter is thoroughly reviewed in *Cook v. Phillips* 162 Atl. 732. The court said:

“We do not think that the mere dictation or writing of a letter coupled with reference to the mailing of letters is sufficient to constitute proof of mailing or corroborating circumstances sufficient to establish the fact that the custom in the particular instance had in fact been followed.”

See also *Commercial Cable Building v. McKenna*, 171 N.Y.S. 409; *Mankin v. Parry*, 70 Pa. Supreme Court.

VI.

Finding No. VII: There is no evidence to support this finding. If Ruth Kalen the alleged tenant testified she never met the defendant O’Sullivan, how can she testify that he demanded and received rent from her for any period of time? The finding further states that the defendant failed and refused to refund to Ruth Kalen the sum of \$150.00 as required by the order reducing the rent. There is no evidence that he ever received the notice referred to.

VII.

Finding No. VIII: There is no evidence to support this finding. The question was never asked as to whether Ruth Kalen had sought a recovery

III.

That the date of first rental of the above mentioned housing accommodations subsequent to March 1, 1942, the date determining the maximum legal rent for housing accommodations in the San Francisco Bay Defense Rental Area, was February 20, 1944.

IV.

That from February 20, 1944, to March, 1945, the above mentioned housing accommodations were occupied by Ruth Kalen and her daughter as tenants, and during all of said period of time the defendant, through his agents and employees, demanded and received from Ruth Kalen the sum of \$75.00 per month for the use and occupancy of said housing accommodations.

V.

That the defendant failed to file a registration statement with the Office of Price Administration for the above mentioned housing accommodations until March 10, 1945.

VI.

That on October 31, 1945, the Rent Director for the Alameda County Defense Rental Area issued an order reducing the maximum legal rent for the above described housing accommodations from \$75.00 per month to \$62.50 per month, and making such reduction effective from the first rental period after September 30, 1943, and directing the defend-

ant to refund to the tenant, within 30 days after the issuance of the order, any rent received by the defendant in excess of the maximum legal rent fixed by this order for a rental period commencing on or after October 1, 1943, and that a copy of said order was mailed to the defendant.

VII.

That the amount of rent demanded and received by the defendant from Ruth Kalen from February 20, 1944, to March, 1945, in excess of the maximum legal rent fixed by the above mentioned order was \$150.00, and that the defendant, within 30 days of the issuance of the order or on November 30, 1945, had failed and refused to refund to Ruth Kalen the said sum of \$150.00, as was required by the order reducing the rent.

VIII.

That Ruth Kalen has not instituted any action against the defendant pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, or otherwise.

CONCLUSIONS OF LAW

I.

This court has jurisdiction of the parties and the subject matter of this action.

II.

That upon the defendant's failure to refund the sum of \$150.00 to Ruth Kalen within 30 days after October 31, 1945, the said sum of \$150.00 became,

on December 1, 1945, an "overcharge" within the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as amended.

III.

Defendant is a violator of the Emergency Price Control Act of 1942, as amended.

IV.

Plaintiff is not entitled to an injunction restraining the defendant from violations of the Rent Regulations for Housing.

V.

Plaintiff is entitled to judgment that defendant be:

A. Required and directed to:

1. Pay to Mrs. Ruth Kalen the sum of One Hundred Fifty (\$150.00) dollars.
2. Pay to the plaintiff for the use of the United States the sum of Three Hundred (\$300.00) dollars.

Dated this 13th day of March, 1947.

LEON R. YANKWICH,
Judge of the United States
District Court.

Approved as to form. Dated

F. E. FUHRMAN,
Attorney for Plaintiff.

(Receipt of Service.)

[Endorsed]: Filed March 13, 1947.

In the District Court of the United States, Northern
District of California, Southern Division

No. 26257-R

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls,

Plaintiff,

vs.

JOHN O'SULLIVAN,

Defendant.

JUDGMENT

The plaintiff, herein, having commenced this action as provided by law, praying for judgment as set forth in the complaint herein, and

It appearing that summons and complaint were duly served upon defendant as shown by the return thereon, and

Defendant having appeared by attorney and filed his answer to the complaint, herein, and this cause having come on for trial before me on the 3rd day of March, 1947, and having heard testimony, herein, on behalf of the plaintiff, and on behalf of the defendant, and plaintiff having duly filed his Findings of Fact and Conclusions of Law,

Now, It Is Hereby Ordered Adjudged and Decreed:

That the defendant pay to Ruth Kalen the sum

of \$150.00 and that the plaintiff have judgment against the defendant on behalf of the United States of America in the sum of \$300.00, together with the cost of this action, and that portion of the complaint praying for an injunction against the defendant for violation of the Rent Regulation for Housing be and is hereby dismissed without cost and without prejudice.

Dated this 13th day of March, 1947.

LEON R. YANKWICH,
United States District Judge.

Approved as to form.

Dated.....

.....,
Attorney for Defendant.

(Receipt of Service.)

[Endorsed]: Filed and entered March 13, 1947.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND PETITION
FOR REHEARING AND FOR AMEND-
MENT OF FINDINGS

This is a motion for new trial and petition for rehearing filed on behalf of John O'Sullivan, defendant in the above entitled matter, moving for a new trial and petition for rehearing from the judgment made and entered by the above entitled Court on March 13, 1947, and each and every part

thereof, and is also predicated on the order made and entered by the above entitled Court denying the defendant's motion to dismiss the proceedings.

The grounds for this motion for a new trial and petition for rehearing are as follows:

1. Errors of law occurring in these proceedings and excepted to by the petitioner herein.
2. That the judgment made and entered and hereinabove referred to is void and/or voidable.
3. That the Court in granting said judgment and denying the motion to dismiss acted contrary to law.
4. Insufficiency of evidence to justify and uphold the findings of fact.
5. Insufficiency of evidence to justify the judgment.

The defendant further moves that the findings made by the Court be amended as follows:

(1) That the statute of limitations as applied to the cause of action alleged and as pleaded by defendant to the violations referred to in Paragraph III of the complaint apply, and that the said cause of action so stated is barred by the statute of limitation in that the action was not brought within one year prior to the alleged violations.

(2) That it is not true that the defendant ever received a notice in writing from the Price Administrator dated October 31, 1945.

The motions herein referred to will be predicated on this notice of motion together with all the records, papers and files in this proceeding.

Dated: March 17, 1947.

CHARLES A. CHRISTIN,
THOMAS J. KEEGAN,
Attorneys for Defendant.

Memorandum of Points and Authorities

Matheny v. Porter, 158 F. 2d 478;

Thompson v. Taylor, 62 F. Sup. 930;

Bowles v. Babcock, 65 F. Sup. 380;

Cook v. Phillips, 162 Atl. 732;

Commercial Cable Bldg. v. McKenna, 171
N.Y.S. 409;

Porter v. Sandberg, 69 F. 2d 29;

Federal Rules of Practice and Procedure,
Secs. 25, 52 and 59;

Porter v. Goodwin, 68 F. 2d 649.

(Affidavit of Mailing.)

(Verification of Notary.)

(Seal)

[Endorsed]: Filed March 20, 1947.

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 28th day of March, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Leon R. Yankwich,
District Judge.

ORDER DENYING MOTION FOR A NEW
TRIAL, ORDER DENYING MOTION FOR
REHEARING, ORDER DENYING MO-
TION TO AMEND FINDINGS, ORDER
DENYING MOTION TO DISMISS

This case came on regularly this day for hearing on the defendant's motions for a new trial, rehearing, and to amend findings. F. E. Fuhrman, Esq. was present for the plaintiff, and Charles Christin, Esq. was present for the defendant. After hearing Mr. Christin and Mr. Fuhrman, it is Ordered that said motions be denied. Further Ordered that defendant's motion to dismiss, heretofore filed, be denied. At the request of Mr. Christin, it is Ordered that the defendant have a ten-day stay of execution herein.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
CIRCUIT COURT OF APPEALS

Notice Is Herbey Given that John O'Sullivan, defendant above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment entered in this action on March 13, 1947, and from those certain orders made in the above entitled matter denying defendant's motion for a new trial and defendant's motion for dismissal of proceedings, and entered on March 28, 1947.

Dated: April 3, 1947.

CHARLES A. CHRISTIN,
T. J. KEEGAN,
Attorneys for Defendant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed April 5, 1947.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 26257 R

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls,

Plaintiff,

vs.

JOHN O'SULLIVAN,

Defendant.

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby
Ordered that the Defendant and Appellant herein
may have to and including June 24, 1947, to file the
Record on Appeal in the United States Circuit
Court of Appeals in and for the Ninth Circuit.

Dated: May 15, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 15, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

You Are Hereby Notified that appellant hereby
designates for inclusion in the record on appeal

in the above entitled matter the complete record and all the proceedings and evidence in the action.

Dated: May 20, 1947.

CHARLES A. CHRISTIN,

THOMAS J. KEEGAN,

Attorneys for Defendant and
Appellant.

(Affidavit of Mailing.)

[Endorsed]: Filed May 22, 1947.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing twenty-seven pages, numbered from 1 to 27, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Paul A. Porter, Administrator, Office of Price Administration, Plaintiff, vs. John O'Sullivan, Defendant, No. 26257 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.80 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of June, A.D. 1947.

C. W. CALBREATH,
Clerk.

[Seal] /s/ M. E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 26,257-R

Before: Hon. Leon R. Yankwich,
Judge.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Plaintiff,

vs.

JOHN O'SULLIVAN,

Defendant.

REPORTER'S TRANSCRIPT

Monday, March 3, 1947

Counsel Appearing:

For Plaintiff F. Fuhrman, Esq.

For Defendant: Charles A. Christin, Esq.

The Clerk: Fleming vs. O'Sullivan.

Mr. Fuhrman: Ready.

Mr. Christin: Ready.

The Court: Proceed to trial.

RALPH G. SPENCER

called for the Plaintiff; sworn.

The Clerk: Will you state your name to the court, please? A. Ralph G. Spencer.

Direct Examination

By Mr. Fuhrman:

Q. Mr. Spencer, where do you reside?

A. In Oakland, California.

Q. What is your address?

A. 6356 Broadway Terrace.

Q. What is your occupation?

A. I am a rent examiner in the Oakland Office of the Office of Temporary Controls, Office of Price Administration.

Q. How long have you been an examiner for that organization?

A. I was employed as junior examiner first; since October, 1942.

Q. October, 1942? A. Yes.

Mr. Fuhrman: Will you mark this paper for identification?

The Clerk: Plaintiff's Exhibit 1 for Identification.

Q. (By Mr. Fuhrman): Mr. Spencer, are you the custodian of the Office of Temporary Controls for registration filed on housing accommodations by landlords in the San Francisco Bay area and Alameda County Defensee Rental Area?

A. That is right, in the Alameda County Defensee Rental Area.

(Testimony of Ralph G. Spencer.)

Q. I will show you Plaintiff's Exhibit 1 for Identification and ask you to tell the court what it is.

Mr. Christin: It speaks for itself.

The Court: He may identify the document.

A. This is the landlord's registration of housing accommodations in Alameda.

Q. (By the Court): Covering the property mentioned? A. Yes.

Mr. Fuhrman: I will offer this in evidence.

Mr. Christin: Objected to that it is immaterial, irrelevant and incompetent, the proper foundation has not been laid, hearsay.

The Court: Objection overruled.

(The registration was marked Plaintiff's Exhibit 1.)

landlord is required to register separately each rental dwelling unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete a Registration Statement in triplicate. (If not typewritten, be sure the pressure is used so that both carbon copies are clear and distinct.)

OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY-DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form No. 06-R079-42
Form DD-U
Rev'd 9-44 Reg's V-250
AREA OFFICE
COPY

Noted on extra sheets, in triplicate, for sections "D" & "E" if necessary.
nt 3-1-42 Effective Date 7-1-42 42

SECTION A. MAILING ADDRESS OF LANDLORD

Name of Landlord John O'Sullivan
Name of Agent
Address Mail to: John O'Sullivan
Address 1236 Filbert St 1235
City and State S.F. 9

IDENTIFICATION
1. 2510 Central Ave, Alameda, Calif
Address of this rental dwelling unit
2. Apt- 102
Apartment number or location
3. Number of Rooms in unit being registered 3
4. Total Number of dwelling units in this structure 18

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant Mr & Mrs Kalen
Address 2510 Central Ave
City and State Alameda, Calif

MAR 10 1947

SECTION C. MAXIMUM RENT

Read carefully and fill in every item which applies to this dwelling unit.

Rent on "Maximum Rent date" \$ per week () per month ()
Not rented on "Maximum Rent date" but rented at any time during the two-month period ending on "Maximum Rent date."
Date last rented during that two-month period: 194
Rent on that date: \$ per week () per month ()
Not rented on "Maximum Rent date" nor at any time during the two-month period ending on "Maximum Rent date," but rented after "Maximum Rent date."
Check one box if applicable:
☒ (a) Owner occupied or vacant on "Maximum Rent date" and during two-month period ending on "Maximum Rent date."
☐ (b) Newly constructed without priority rating.
☐ (c) Newly constructed with priority rating. (If checked, item 6 must also be filled in)
Date first rented after "Maximum Rent date." Feb 20, 1944
Rent on that date: \$ 75.00 per week () per month (X)
Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after "Maximum Rent date."
Date first rented after such change: 194
Rent on that date: \$ per week () per month ()
Substantially changed after "Maximum Rent date," but before the "effective date." Check one box if applicable:
☐ (a) From unfurnished to fully furnished.
☐ (b) From fully furnished to unfurnished.
☐ (c) By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACEMENT AND MAINTENANCE.
Date first rented after such change: 194
Rent on that date: \$ per week () per month ()
Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.
Rent approved by agency granting priority: \$ per week () per month ()
THE MAXIMUM RENT FOR THIS DWELLING UNIT IS:
\$ 75.00 per week (X) per month () \$ 62.50
Enter Maximum Rent in accordance with the following instructions:

(a) If only one of the above items applies to this dwelling unit the Maximum Rent is the rent entered for that item.
(b) If more than one of the above items apply to this dwelling unit the Maximum Rent is the rent reported for the most recent date, except in the case of Item 6.
(c) If item 6 applies to this dwelling unit the Maximum Rent is the lower of the rents entered in Items 1, 3 or 6.
*Note: If any one of the items 3(b), 4 or 5 applies to this dwelling unit you must also fill in the information required in Section "E." The Rent Director may at any time order a decrease in the Maximum Rent determined under Items 3(a), 3(b), 4 or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on the "Maximum Rent date."
Order issued by Rent Director dated Oct 31, 1945 established maximum rent in amount of \$ 62.50 per week (X) per month () La DI 1508-d

Section E - See Note Section C. 7 *

If item 3(b); 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

- (a) New construction (c) A change from unfurnished to fully furnished
(b) A change in the number of dwelling units (d) A major capital improvement

SECTION D. EQUIPMENT AND SERVICES.

(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date you entered in Section C.) (ANSWER "YES" or "NO").

1. EQUIPMENT YES NO
Furniture ☒ ☐
Running Water ☒ ☐
Hot Water ☒ ☐
Flush Toilet ☒ ☐
Bathroom ☒ ☐
Central Heating ☒ ☐
Heating Stove ☒ ☐
Mech. Refrigerator ☒ ☐
Electricity Installed ☒ ☐
Cooking Stove ☒ ☐

If any equipment is shared, explain below:

2. SERVICES YES NO
Garage ☒ ☐
Heat or Heating Fuel ☒ ☐
Cooking Fuel ☒ ☐
Cold Water ☒ ☐
Hot Water ☒ ☐
Light ☒ ☐
Ice or Refrigeration ☒ ☐
Janitor Service ☒ ☐
Garbage Disposal ☒ ☐
Painting & Decorating ☒ ☐
Interior Repairs ☒ ☐
Exterior Repairs ☒ ☐
List any other services:

Are all equipment and services indicated above now included in the rent? Yes (X) No ()
If "No" you must also file Form D-2.

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, Item 7, unless changed by order of the Rent Director (see Section C, Item 8).

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries herein are true and correct.

John O'Sullivan
(Signature of Landlord or his Agent)

(Endor sed): Filed July 18, 1947.

11691
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

JUL 18 1947

PAUL P. O'BRIEN,
CLERK

U. S. DIST. CT. N. D. CAL.

No. 26257R

EX. No. 1
3-3-47

(Testimony of Ralph G. Spencer.)

Q. (By Mr. Fuhrman): Mr. Spencer, whose signature appears as the landlord of the housing accommodations?

Mr. Christin: I object to that on the ground the proper foundation has not been laid, hearsay, and calling for his conclusion.

The Court: I don't think that he can testify to that unless he knows the signature. Of course, he has to go on the legal presumption that a landlord is required to register.

Q. (By Mr. Fuhrman): Does the name of the landlord appear thereon?

Mr. Christin: I don't think he can testify to that. The legal presumption is one thing, but for him to testify——

The Court: I will sustain the objection. I do not think you have to prove that. It is admitted in evidence.

Mr. Fuhrman: The registration indicates that it was filed by John O'Sullivan, and it gives the date first rented after Maximum Rent date as February 20, 1944, and the rent that was being charged on that date was \$75. It shows it was then rented to Mr. and Mrs. Kalen, and it covers apartment 102 at 2510 Central Avenue, Alameda, California. The registration also indicates that it was not filed until March 10, 1945.

Mr. Fuhrman: Will you mark that Plaintiff's Exhibit 2 for Identification?

(Testimony of Ralph G. Spencer.)

The Clerk: Plaintiff's Exhibit 2 for Identification.

Q. (By Mr. Fuhrman): Mr. Spencer, are you the custodian of documents known as Notice of Proceedings by Rent Director issued by the rent director for the San Francisco Bay Defense Rental Area, Oakland, California? A. I am.

Q. I will show you Plaintiff's Exhibit 2 for Identification and ask you to tell the court what it is.

A. This is a notice of the rent director proposing to reduce the rent.

Q. It speaks for itself.

Mr. Fuhrman: I offer this in evidence as Plaintiff's Exhibit 2.

Mr. Christin: Objected to as immaterial, irrelevant, and incompetent, and no foundation laid, not binding on us.

The Court: Let me have it. It does not appear that in due course of business either this or a copy of this was mailed to the addressee; otherwise it would merely be a memorial or testimonial of something that was done in the office. This original evidently never left the files of the Office of Price Administration.

Mr. Fuhrman: Very well, I will elicit that testimony.

Q. Mr. Spencer, would you please describe the method by which your office issued notices of proceedings?

(Testimony of Ralph G. Spencer.)

Mr. Christin: We will object to the form of the question. It does not bind the defendant in this case.

Q. (By Mr. Fuhrman): In the regular course of business prescribed by your office are notices of proceedings sent out to the person whose name appears on the notice of proceedings?

Mr. Christin: I object to the form of the question as leading.

The Court: Objection overruled.

A. They are made up in original and duplicate for mailing to the landlord.

Q. (By Mr. Fuhrman): Where is the resting place of the original, or what becomes of the original document?

A. The original document is held in our files; the duplicate is mailed to the landlord.

Q. Do you have a regular course of business or practice which you follow in such cases?

A. Yes, it is all under control through a card system from one department to the other back to the director or designated officer, and assigned back to the mailing department.

Mr. Fuhrman: I offer this in evidence.

Mr. Christin: The same objection.

The Court: You do not know personally whether that was followed in this particular case?

A. I have no reason to think it was not, it is such a routine matter, it is all kept on record on our control cards that it goes from one department

(Testimony of Ralph G. Spencer.)

to the other to the designated officer, and assigned to the mailing department. It is entirely routine.

The Court: I will overrule the objection. It may be received in evidence.

(Notice of proceeding by rent director marked Plaintiff's Exhibit 2.)

PLAINTIFF'S EXHIBIT No. 2

OPA Form D-18

Notice of Proceedings by Rent Director

Stamp of Issuing Office: San Francisco Bay Defense Rental Area, 2090 Broadway, Oakland 12, California.

Concerning (Description of Accommodations)—
2510 Central Ave., Alameda, Calif. (apt. #102).

Docket No. Ala DI 1508-d

To John O'Sullivan, 1235 Filbert St., San Francisco, Calif.

A preliminary investigation by the Rent Director indicates that the Maximum Rent for the above-described accommodations should be decreased on the grounds stated in Section(s) 5(c)(1)-4(e) of the Rent Regulation. Therefore, the Rent Director proposes to decrease the Maximum Rent from \$75.00 per month to \$62.50 per month, retroactive beginning with the first rental period after Sept. 30, 1943.

In the event you wish to file objections to this

(Testimony of Ralph G. Spencer.)

proposed action, such objections must be filed within 10 days from the date of this notice.

Written Evidence Supporting Your Objections Must Also Be Filed. Your objections and supporting evidence should be typed or legibly written. The Address of the above housing accommodations and the Docket Number appearing on this notice should be placed on each document filed.

If no objections and supporting evidence are filed within the above period, the Rent Director may enter an order decreasing the Maximum Rent without further notice.

The landlord has failed to file a registration statement within the time specified in Section 4(e) of the regulation and this proceeding is commenced within three months after the date of filing of such registration statement. In such cases the regulation provides that the order of the Rent Director under Section 5(c-1) shall be effective to decrease the maximum rent from the date of first renting or October 1, 1943, whichever is the later, unless the Rent Director finds that the landlord was not at fault in failing to file a proper registration statement within the time specified. In the event the landlord wishes to present evidence that he was not at fault such evidence must be presented in writing within ten days from the date of this notice.

Date: June 8, 1945.

HENRY A. CROSS,

Rent Director for the San Francisco Bay Defense
Rental Area.

(Testimony of Ralph G. Spencer.)

Section 5 (c) of the Rent Regulation for Housing provides:

The Rent Director at any time, on his own initiative or on application of the tenant, may order a decrease of the Maximum Rent otherwise allowable, only on the grounds that:

(1) The Maximum Rent for housing accommodations under paragraph (c), (d), (e), or (g) of Section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date.

(2) There has been a substantial deterioration of the housing accommodations other than ordinary wear and tear since the date or order determining its Maximum Rent.

(3) There has been a decrease in the minimum services, furniture, furnishings or equipment required by Section 3 since the date or order determining the Maximum Rent.

(4) The rent on the date determining the Maximum Rent was materially affected by the blood, personal, or other special relationship between the landlord and the tenant and as a result was substantially higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date.

(5) The rent on the date determining the Maximum Rent was established by a lease or other rental agreement which provided for a substantially lower

(Testimony of Ralph G. Spencer.)

rent at other periods during the term of such lease or agreement.

(6) The rent on the date determining the Maximum Rent was substantially higher than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Rent Director's order may if he deems it advisable provide for different Maximum Rents for different periods of the calendar year.

(7) There has been a substantial decrease in the number of subtenants or other occupants since an order under paragraph (a) (8) or (c) (8) of this section.

(8) The Maximum Rent is established under Section 4 (i) and is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date, taking into consideration any increased occupancy of such accommodations since that date by subtenants or other persons occupying under a rental agreement with the tenant: Provided, That no decrease shall be ordered below the rent on the Maximum Rent Date.

Section 4 (e) of the Rent Regulation for Hotels and Rooming Houses provides:

For a room with which meals were provided during the 30-day period determining the Maximum Rent without separate charge therefor, the rent

(Testimony of Ralph G. Spencer.)

apportioned by the landlord from the total charge for the room and meals. The landlord's apportionment shall be fair and reasonable and shall be reported in the Registration Statement for such room. The Rent Director at any time on his own initiative or on application of the tenant, may by order, decrease the Maximum Rent established by such apportionment, if he finds that the apportionment was unfair or unreasonable.

Every landlord who provides meals with accommodations shall make separate charges for the two. No landlord shall require the taking of meals as a condition of renting any room unless the room was rented or offered for rent on that basis on June 15, 1942.

Section 5 (c) of the Rent Regulation for Hotels and Rooming Houses provides:

The Rent Director at any time, on his own initiative or on application of the tenant, may order a decrease of the Maximum Rent otherwise allowable, only on the grounds that:

(1) The Maximum Rent for the room is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date.

(2) There has been a substantial deterioration of the room other than ordinary wear and tear since the date or order determining its Maximum Rent.

(3) There has been a decrease in the minimum

(Testimony of Ralph G. Spencer.)

services, furniture, furnishings or equipment required by Section 3 since the date or order determining the Maximum Rent.

(4) The rent on the date determining the Maximum Rent for the room was substantially higher than at other times of year by reason of seasonal demand for such room. In such cases the Rent Director's order may if he deems it advisable provide for different Maximum Rents for different periods of the calendar year.

[Endorsed]: Filed July 18, 1947.

Mr. Fuhrman: This is a noticee of proceedings by rent director, signed by Henry A. Cross, Rent Director. It states that after a preliminary investigation the rent director proposes to decrease the rent on Apartment 102, 2510 Central Avenue, Alameda, California, on the grounds stated in Section 5(c) (1) of the Rent Regulations, and he intends to reduce it from \$75 per month to \$62.50 per month retroactive beginning with the first rental period after September 30, 1943. It states that because the landlord has failed to file a registration statement within the time specified in Section 4(e) of the Regulations, and this proceeding is commenced within three months after the date of filing of such registration statement. In such cases the regulation provides that the order of the Rent Director under Section 5(c) (1) shall be effected to decrease the maximum rent from the

(Testimony of Ralph G. Spencer.)

date of first renting on October 1, 1943, whichever is the later, unless the Rent Director finds that the landlord was not at fault in failing to file a proper registration statement within the time specified. In the event the landlord wishes to present evidence that he was not at fault, such evidence must be presented in writing within ten days from the date of this notice.

Q. Are you the custodian of orders decreasing maximum rent issued by the Alameda County Defense Rental Area? A. That is right.

Mr. Fuhrman: Will you mark this Plaintiff's Exhibit 3 for Identification?

The Clerk: Plaintiff's Exhibit 3 for Identification.

Q. (By Mr. Fuhrman): Mr. Spencer, do you in the course of business in the office at Oakland, California, issue orders decreasing maximum rent?

A. Decreasing maximum rent, yes.

Q. Will you please tell the court what that document is.

A. This is the order that the director in the previous document proposed to issue decreasing the maximum rent from the \$75 to \$62.50, retroactive beginning with the first rental period after September 30, 1943.

Mr. Fuhrman: I ask to introduce this in evidence.

Mr. Christin: Objected to on the ground it is immaterial, irrelevant, and incompetent, the proper

(Testimony of Ralph G. Spencer.)

foundation has not been laid, it is only a piece of paper, it could not bind anybody.

The Court: I think the same showing should be made as was done as to the previous offer. I will withhold a ruling until that is done.

Q. (By Mr. Fuhrman): Mr. Spencer, will you describe the procedure followed by your office in issuing orders for reducing maximum rent?

Mr. Christin: Objected to as not binding on this defendant.

The Court: Overruled.

A. Sometime after the issuance of the first notice a typing of the order in triplicate is done; it goes through the control system to the desk of the director, or the designated officer, and he signs the original, which remains in the file—that is the Government procedure, by the way, on all original documents—and a copy is mailed to the landlord designated in the order and a copy is also mailed to the tenant who is designated in the notice.

Q. (By Mr. Fuhrman): Is that procedure followed in the regular course of business in each case where he issues an order decreasing rent?

Mr. Christin: I offer the same objection.

The Court: Overruled.

A. Yes, it is followed in every case.

Mr. Fuhrman: I offer this in evidence.

Mr. Christin: I object on the ground the proper foundation has not been laid.

The Court: Overruled.

(Testimony of Ralph G. Spencer.)

(Order decreasing maximum rent is marked Plaintiff's Exhibit 3.)

PLAINTIFF'S EXHIBIT No. 3

OPA Form D-38

Order Decreasing Maximum Rent

Stamp of Issuing Office—Alameda County Defense-Rental Area, 319-14th Street, Oakland 12, California.

Concerning (Description of Accommodations)—
Apt. #102, 2510 Central Ave., Alameda.

Docket No.—Ala DI-1508-d.

To: John O'Sullivan, 1235 Filbert St., San Francisco, Calif.

Due notice having been given the landlord of the above-described accommodations, the Rent Director has considered the evidence in this matter and finds that the facts in this case require a reduction of the Maximum Rent on the grounds stated in Section(s) 5(c)(1)-4(e) of the Rent Regulation.

Therefore, on the basis of the rent which the Rent Director finds was generally prevailing in this Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date, it is ordered that the Maximum Rent for the above-described accommodations be, and it hereby is, changed from \$75.00 per mo. to \$62.50 per month,

(Testimony of Ralph G. Spencer.)

retroactive beginning with the first rental period after Sept. 30, 1943.

Issued Oct. 31, 1945. No rent in excess of the Maximum Rent established by this order may be received or demanded. This order will remain in effect until changed by the Office of Price Administration.

The Rent Director finds that the landlord has failed to file a registration statement for the above housing accommodations within 30 days as required by Sections 4(e) and 7 of the Regulation. This order shall, therefore, be effective to decrease the maximum rent from the beginning of the first rental period on or after October 1, 1943. Any rent received by the landlord in excess of the maximum rent fixed by this order for a rental period commencing on or after said date shall be refunded to the tenant, within 30 days from the date of this order.

A. BANDETTINI,

Alameda County Defense
Rental Area.

Copy to: Mr. Kalen, 2510 Central Ave. (apt. #102),
Alameda, Calif.

[Endorsed]: Filed July 18, 1947.

Mr. Fuhrman: This is an order decreasing maximum rent. It is signed by A. Bandettini, Area Rent Director, with the address of the defendant

(Testimony of Ralph G. Spencer.)

O'Sullivan, 1235 Filbert Street, San Francisco, and concerns Apartment 102, 2510 Central Avenue, Alameda. It is Docket No. ALA DI-1508-d. It says, "Due notice having been given the landlord of the above-described accommodations the Rent Director has considered the evidence in this matter and finds that the facts in this case require a reduction in the maximum rent on the grounds stated in Section 5(c)(1) of the Rent Regulation—4(e). Therefore, on the basis of the rent which the Rent Director finds was generally prevailing in the Defense Rental Area for comparable housing accommodations on the maximum rent date, it is ordered that the maximum rent for the above-described accommodations be and it hereby is changed from \$75 a month to \$62.50 a month, retroactive beginning with the first rental period after September 30, 1943. Issued October 31, 1945." The order further states that the Rent Director finds that the landlord has failed to file a registration statement for the above housing accommodations within 30 days, as required by Sections 4(e) and 7 of the Regulation. This order shall, therefore, be effective to decrease the maximum rent from the beginning of the first rental period on or after October 1, 1943. Any rent received by the landlord in excess of the maximum rent fixed by this order for a rental period commencing on or after said date shall be refunded to the tenant within 30 days from the date of this order.

That is all.

(Testimony of Ralph G. Spencer.)

Cross-Examination

By Mr. Christin:

Q. Did you personally mail any of these documents or copies of them to the defendant?

A. No.

Q. How many employees did you have at your office, approximately?

A. At the present time?

Q. At that time.

Mr. Fuhrman: I will object to that question.

The Court: If he knows; it goes to the weight of the testimony.

A. At that time about 30.

Q. (By Mr. Christin): What was your principal duties there?

A. I was supervising rent examiner.

Q. You would interview people coming in with complaints of landlords?

A. Very few interviews.

Q. I will show you the registration and ask you to read staring with "John O'Sullivan."—read what it says.

A. "John O'Sullivan, 1230 Filbert Street." That was later corrected to 1235.

Q. Where is the correction, 1235 on there?

A. I don't know. Mr. O'Sullivan probably put it on there.

Q. But that is the registration, that is the original from which you prepared the notice which you sent?

(Testimony of Ralph G. Spencer.)

A. Yes, 1235 was placed afterward.

Q. Where does it say 1235?

A. Evidently the man added 1235, thinking it was correct.

Q. 1230 is the registration, and 1235 is in the notice of June.

The Court: I notice that. The owner lived in San Francisco?

Mr. Christin: That is not the point. I am looking at the registration.

The Court: Oh, yes.

Mr. Christin: There appears 1230 there and then a "5" is superimposed. They had the wrong address.

The Court: All right, that is a matter of argument.

Mr. Christin: I see that these were signed by different people, one signed by Henry A. Cross, who is in San Francisco?

A. Mr. Cross was the area rent director until about September, 1944, and the Alameda County Defense Rental Area became separated from the San Francisco District, and the notice was sent by Mr. Bandettini.

Q. Did Mr. Henry Cross sign that, himself?

A. No.

Q. Who signed that? A. I signed it.

Q. You signed his name? A. Yes.

Q. All you know is you have got in your files three original documents in evidence here; that is all you know of your own knowledge?

A. Yes.

(Testimony of Ralph G. Spencer.)

Q. You don't know of your own knowledge whether they were sent out, or not?

A. I did not mail them.

Mr. Christin: That is all.

RUTH KALEN

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. Mrs. Ruth Kalen.

Direct Examination

By Mr. Fuhrman:

Q. Where do you reside?

A. 2510 Central Avenue, Alameda.

Q. Which apartment are you now living in?

A. Apartment 101.

Q. Where did you live prior to the time you lived in apartment 101 at 2510 Central Avenue?

A. Apartment 102.

Q. At what address?

A. 2510 Central Avenue.

Q. At what time did you move into apartment 102, 2510 Central Avenue, Alameda?

A. February 20, 1944.

Q. How long did you occupy Apartment 102 at 2510 Central Avenue?

A. Until the 10th of October, 1945.

Q. During the time that you lived in Apartment 102 at 2510 Central Avenue, Alameda, who resided in the apartment with you?

A. My daughter, who at the present time is Mrs.

(Testimony of Ruth Kalen.)

Karemtis; she was married on the 21st of September, or August, I have forgotten, 1945—in September, I think it was.

Q. What rent did you pay for apartment 102, 2510 Central Avenue, Alameda? A. \$75.

Q. A month? A. A month.

Q. Who was your landlord while you were residing at 2510 Central Avenue?

Mr. Christin: That is a conclusion, hearsay.

Mr. Fuhrman: I don't think it is.

The Court: I will sustain the objection.

Q. (By Mr. Fuhrman): To whom did you pay your rent?

A. I paid my rent to a manager named Brinkerhoff, I believe it was, up until a certain time, and then that manager left, and Mr. Allenger took over—I don't remember just the date when that change was made.

Q. Have you ever received a refund from Mr. O'Sullivan from any rent he collected while you were a tenant there?

A. No, I have not, not at all.

Q. (By the Court): In what form did you pay your rent?

A. Well, most of the time—sometimes by check.

Q. When you paid by check whom did you make it payable to? A. To the manager.

Q. Was it Mr. O'Sullivan?

A. No, I didn't know Mr. O'Sullivan.

Q. How large a building was it?

(Testimony of Ruth Kalen.)

A. There are 18 units in the apartment house.

Q. Is it spread out? A. It is three stories.

Q. All occupied by apartments—was the entire building devoted to apartments? A. Yes.

Q. Regular apartments? A. Yes.

The Court: That is all.

Mr. Fuhrman: That is all.

Mr. Christin: No questions.

Mr. Fuhrman: Plaintiff rests.

CERTIFICATE OF REPORTER

I, Edward W. Lehner, Official Reporter, certify that the foregoing 15 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

[Endorsed]: No. 11691. United States Circuit Court of Appeals for the Ninth Circuit. John O'Sullivan, Appellant, vs. Philip B. Fleming, Administrator, Office of Temporary Controls, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 18, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11691

JOHN O'SULLIVAN,

Appellant,

vs.

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls,

Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY, AND
DESIGNATION OF RECORD ON APPEAL

I.

The appellant hereby adopts the Designation of Contents of Record on Appeal heretofore filed in the District Court of the United States, Northern District of California, Southern Division.

II.

The statement of points on appeal is as follows:

(a) The complaint fails to state a cause of action, as there is no allegation that the alleged violation occurred within one year immediately prior to the filing of the complaint.

(b) That no showing has been made under Rule 25 of the Federal Rules of Civil Procedure justify-

ing continuance of these proceedings in the name of the present plaintiff.

(c) That the present plaintiff cannot maintain the present proceeding.

Dated July 31, 1947.

/s/ CHARLES A. CHRISTIN,

/s/ THOMAS J. KEEGAN,

Attorneys for Appellant.

Receipt of a copy of the within Statement of Points upon which Appellant Intends to Rely, and Designation of Record on Appeal is hereby acknowledged this 31st day of July, 1947.

/s/ F. E. FUHRMAN,

Attorney for Respondent.

[Endorsed]: Filed July 31, 1947.



11691
No. ~~11,265~~

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN O'SULLIVAN,

Appellant,

VS.

FRANK R. CREEDON, Office of Housing
Expediter,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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Upon Appeal from the District Court of the United States for the
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APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from the judgment of the District Court for the Northern District of California in favor of the appellee and against appellant, in which judgment it was ordered that the defendant pay to one Ruth Kalen the sum of \$150.00, and that the plaintiff have judgment against the defendant, on behalf of the United States of America in the sum of \$300.00. Jurisdiction of the District Court and this Court is granted by Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e).

STATEMENT OF FACTS.

On August 6, 1946, Paul A. Porter, Administrator of the Office of Price Administration, filed a complaint in the District Court for the Northern District of California, Southern Division, against the defendant, John O'Sullivan, alleging that since July 1, 1942, the defendant demanded and received rents higher than the maximum rents permitted by the Rent Regulations, and demanded a preliminary and final injunction against the defendant and judgment in favor of the Administrator for three times the amount of each overcharge, or \$50.00, whichever was the greater, to each tenant so overcharged.

The cause was heard on March 3, 1947. The evidence adduced established that on July 8, 1945, the Rent Director for the San Francisco Bay Defense Rental Area issued an order proposing to decrease the maximum rent for the premises involved from \$75.00 per month to \$62.50 per month retroactive beginning with the first rental period after September 30, 1943. (Rep. Tr. p. 36.)

Thereafter on October 31, 1945, an order decreasing maximum rent retroactive beginning with the first rental period after September 30, 1943, was issued. The order further provided that any rent received by the landlord in excess of the maximum rent fixed by the order for a rental period commencing on or after October 1, 1943, must be refunded to the tenant within thirty days from the date of the order. (Rep. Tr. p. 44.) No refund was ever made under this order. (Rep. Tr. p. 50.)

SPECIFICATION OF ERRORS.

1. The Court erred in granting judgment for the plaintiff.

2. The Court erred in denying defendant's motion to dismiss.

3. The Court erred in holding that the claim of the Administrator was not barred by the provisions of Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e), which provides that action to recover overcharges must be instituted within one year of the time of the overcharge.

ARGUMENT.

Section 205 (e) of the Emergency Price Control Act as amended (50 U.S.C. 925e) provides in part as follows:

“If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.”

In this case the Administrator's complaint was filed on August 6, 1946. The overcharges complained of were paid from February 20, 1944, to March, 1945 (Findings of Fact, Transcript of Record, page 18, Finding IV). Thus it is apparent that the Admin-

istrator's action was commenced more than one year after the alleged overcharges.

Creedon v. Stone, 163 Fed. (2d) 393 (C.C.A. 6), is an exactly similar case involving a retroactive reduction of rent in which the defendant failed to make refund. The Court held that the Administrator's action was barred by the one-year statute of limitations of Section 205 (e), stating in part as follows:

“The principal legal question presented is whether the one-year statute of limitations provided by the Act commences to run from the time of overcharge, as held by the District Court or from the time of the failure to refund, as contended by the Administrator.

We think the judgment of the District Court is clearly correct. Section 205 (e) is ‘the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties.’ *Porter v. Warner Holding Co.*, 328 U.S. 395, 401, 402.

Read in the ordinary sense, as applied to the payment of rent, Sec. 205 (e) plainly provides that each separate overcharge is the violation referred to. Each separate overcharge is certainly a violation of the regulation or order ‘prescribing a maximum price,’ and each separate overcharge gives rise to a cause of action for the violation. *Gilbert v. Thierry*, 58 Fed. Supp. 235 (D. C. Mass.), affirmed, *Thierry v. Gilbert*, 147 Fed. (2d) 603, 604 (C.C.A. 1). There is no merit in the contention that the violation upon which this cause of action is based is the failure or refusal to make the refund. Such a failure or refusal

is a violation of Section 4 (e) of the Rent Regulation for Housing, and if a refund order is issued by the Administrator, it is a violation of the order; but such failure or refusal is not the violation specified in Sec. 205 (e), which is the violation of the 'maximum price regulation' or order. To causes of action based on these overcharges, since they are violations under Sec. 205 (e), the one-year statute of limitations applies."

It is respectfully submitted that the above cited case is decisive of the present action, and that the judgment of the trial Court must be reversed.

Dated, San Francisco, California,
November 3, 1947.

Respectfully submitted,

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THOMAS J. KEEGAN,

Attorneys for Appellant.

No. 11691

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

JOHN O'SULLIVAN, APPELLANT

v.

**THE E. WOODS, Acting, Housing Expediter,
Office of Housing Expediter.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION**

BRIEF OF APPELLEE

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11691

JOHN O'SULLIVAN, APPELLANT

v.

TIGHE E. WOODS, ACTING HOUSING EXPEDITER, OFFICE
OF THE HOUSING EXPEDITER, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal by the defendant below from a judgment for statutory damages pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C., Sec. 901 et seq.), for alleged violation of the Rent Regulation for Housing, as amended (8 F. R. 14663) (R. 21, 26).

The material facts upon this appeal are not in dispute. Defendant is the owner of housing accommodations located in San Francisco, California. As such, defendant since July 1, 1942, has been subject to the Rent Regulation for Housing (hereinafter referred to as "the Regulation"). This Regulation went into effect July 1, 1942, and established March 1, 1942, as the maximum rent date.

Under Section 4 (e) of the Regulation, it is provided that the maximum rents for housing accommodations, not rented at any time during the two months ending on the maximum rent date (or between that date and the effective date), shall be, so far as is here pertinent, the first rents for such accommodations after the effective date. But, in cases where the accommodations are so rented for the first time after the maximum rent date, the landlord is obliged to register the accommodations with the Area Rent Office within thirty days after so renting. The purpose of requiring a timely registration statement is to provide the Area Rent Director with prompt information of the new renting, so that he may speedily proceed to review the first rent to determine whether it ought to be reduced under the applicable standards. Where the registration statement is filed in time, any order of the Area Rent Director reducing the maximum rent operates prospectively only.

However, the Administrator felt that if the landlord failed to file a proper registration statement within the specified time, that he ought not to gain by his own delay. Therefore, Section 4 (e) of the Regulation likewise provides that in such a case, the self-determined rent fixed and received by the landlord is "subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under Section 5 (c) (1)." Section 4 (e) further provides that unless the Rent Director finds that the landlord was not at fault in failing to file a timely registration statement and, therefore,

relieves the landlord of the duty to refund, that the landlord is obliged to refund the excess payments to the tenant within thirty days after the date of the issuance of the reduction order (Section 4 (e) of the Regulation, App. 28).

Section 5 (c) of the Regulation provides that the Administrator at any time on his own initiative or on application of the tenant "may order a decrease of the maximum rent otherwise allowable" on the ground, among others, that "(1) the maximum rent for housing accommodations under * * * Section 4 is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date" (Section 5 (c), App. 29).

Section 204 (d) of the Act requires every enforcement court to accept as valid and binding in a proceeding before it, any regulation or order issued pursuant to Section 2, and commits all questions relating to the validity thereof solely to the Emergency Court of Appeals (App. 24-25).

The testimony showed that the defendant rented the accommodations involved in this case to Ruth Kalen and her daughter on February 20, 1944, and the Court found that the date of the first rental of these housing accommodations subsequent to March 1, 1942 (maximum rent date) was February 20, 1944 (Finding III, R. 18). The Court further found that from February 20, 1944 to March 1945, defendant demanded and received from the above-named tenants, the sum of \$75.00 per month for the housing accommodations

(Finding IV, R. 18). These accommodations were not registered within thirty days of such renting as was required by Section 4 (e) and Section 7 of the Regulation (See App. 29), but, as the Court found, defendant first registered these accommodations on March 10, 1945 (Finding V, R. 18).

On October 31, 1945, the Area Rent Director, acting pursuant to authority vested in him by Section 5 (c) (1), issued an order¹ reducing the rent for the accommodations from \$75.00 per month to \$62.50 per

¹ This order provides as follows (R. 44-45) :

"To: John O'Sullivan, 1235 Filbert St., San Francisco, Calif.

"Due notice having been given the landlord of the above-described accommodations, the Rent Director has considered the evidence in this matter and finds that the facts in this case require a reduction of the Maximum Rent on the grounds stated in Sections 5 (c) (1) and 4 (e) of the Rent Regulation.

"Therefore, on the basis of the rent which the Rent Director finds was generally prevailing in this Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date, it is ordered that the Maximum Rent for the above-described accommodations be, and it hereby is, changed from \$75.00 per month to \$62.50 per month, retroactive beginning with the first rental period after September 30, 1943.

"Issued October 31, 1945. No rent in excess of the Maximum Rent established by this order may be received or demanded. This order will remain in effect until changed by the Office of Price Administration.

"The Rent Director finds that the landlord has failed to file a registration statement for the above housing accommodations within 30 days as required by Sections 4 (e) and 7 of the Regulation. This order shall, therefore, be effective to decrease the maximum rent from the beginning of the first rental period on or after October 1, 1943. Any rent received by the landlord in excess of the maximum rent fixed by this order for a rental period commencing on or after said date shall be refunded to the tenant, within 30 days from the date of this order" (R. 44-45).

month, making such reduction effective from the first rental period, and directing the defendant to refund to the tenants, within thirty days after the issuance of the order, any rent received by the defendant in excess of the maximum legal rent fixed by the order (R. 44-45). The Court found that a copy of said order was mailed to the defendant (R. 19).

Upon defendant's refusal to comply with the order directing the refund of overcharges, this action was instituted by the Administrator for statutory damages under Section 205 (e) of the Act, and for injunctive relief pursuant to Section 205 (a) of the Act (R. 2-5).

In his answer, defendant denied the charges of violation and, as a further separate and affirmative defense, alleged that the action was barred by the statute of limitations provided by Section 205 (e) of the Act (R. 5-7).

After trial, and upon consideration of the pleadings, the Court found that the amount of rent demanded and received by the defendant from the tenants from February 20, 1944, to March 1945, in excess of the maximum legal rent fixed by the order was \$150.00, and that defendant had failed and refused to refund to the tenants said sum within thirty days of the issuance of the order or on November 30, 1945, as was required by the order reducing the rent (Finding VII, R. 19); and the Court concluded that upon defendant's failure to refund the sum of \$150.00 to the tenants by November 30, 1945, the said sum of \$150.00 became an overcharge on December 1, 1945, within the pro-

visions of Section 205 (e) of the Act (Conclusion of Law II, R. 20). In sum, the Court held that the statute of limitations provided by Section 205 (e) ran from the time when the defendant failed or refused to obey the retroactive rent-reduction order of the Area Rent Director, rather than from the time when the rent was collected, as contended by defendant. Injunctive relief was denied without costs and without prejudice (R. 22). From this judgment defendant takes this appeal. Presumably, jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. 225).

ARGUMENT

I

The court below was clearly correct in holding that the action was not barred by the statute of limitations provided for by section 205 (e) of the act

A. The statute of limitations started running at the occurrence of the violation; and the violation occurred when defendant refused to obey the refund order of the Area Rent Director

The plain words of Section 205 (e) of the Act support the conclusion reached by the Court below that the statute of limitations ran, not from the time that the rent was paid, but rather from the time the landlord refused to obey the order to refund.

Section 205 (e) provides in part:

If any person selling a commodity violates a regulation, order * * * prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the

occurrence of the violation, except as herein-after provided, bring an action against the seller on account of the overcharge * * *. For the purposes of this section, the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order * * * prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator the buyer shall thereafter be barred from bringing an action for the same violation or violations * * *.

Thus, Section 205 (e) clearly gives a cause of action to a tenant or to the Administrator for a *violation* of a regulation or order prescribing a maximum rent *resulting in an overcharge*. If defendant had refunded the excess payments to the tenant as the order directed at any time prior to December 1, 1945, there would have been no violation and no foundation for suit. Hence, since no cause of action accrued until December 1, 1945, it was not possible for the statute of limitations to begin running at any earlier date.

While defendant's failure to file a timely registration statement for the premises in question violated Section 7 of the Regulation, such violation did not result in an overcharge to the tenant (*Creedon v. Babcock*, 163 F. 2d 480 (C. C. A. 4th)). At that point, pursuant to Section 4 (e) of the Regulation, the legal maximum rent was still the first rent charged, subject to modification by the Area Rent Director upon consideration of the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date, if and when the matter was brought to his attention. Not until the Rent Director issued his order of October 31, 1945, reducing the rent retroactively, did there exist an order prescribing a maximum rent for the premises involved which defendant violated with a resulting overcharge. The precise time of violation was December 1, 1945, the day after the last day allowed defendant for refund of the rent overcharges. Until November 30, 1945, defendant could refund the rent overcharges and still be free from any liability. Defendant's failure to refund by the end of November 30, 1945, was the only violation of an order establishing a maximum rent for which Section 205 (e) of the Act gives a cause of action. At that point, both violation and overcharge occurred. Until December 1, 1945, neither the tenant nor the Price Administrator had any cause of action against the defendant based upon such overcharges. Prior to the Rent Director's order establishing retroactively a reduced maximum rent, neither the tenant nor the Administrator could

bring an action for overcharges because such overcharges had not occurred.

Upon defendant's construction of the Act, however, the one-year period of limitation prescribed by Section 205 (e) would commence to run *before* the cause of action given to the tenant, and alternatively to the Price Administrator, came into existence. Such an interpretation of Section 205 (e) is clearly erroneous in that it disregards the established rule that a statute of limitations commences to run only when a cause of action has accrued so that suit may be instituted upon it. In analogous situations, the Supreme Court has held that statutes of limitation commence to run on a receiver's cause of action to collect an assessment from the stockholders of an insolvent national bank not from the day when the assessment is made, but rather from the last day allowed by the Comptroller of the Currency for payment of the assessment as determined by him. *Rawlings v. Ray*, 312 U. S. 96; *Fisher v. Whiton*, 317 U. S. 217; *Cope v. Anderson*, 67 S. Ct. 1340 (June 1947). So, too, the clear purpose of Section 205 (e) of the Act here is fulfilled only by construing it literally and logically to mean that, under circumstances such as these, the cause of action for damages accrues and the statute of limitations commences to run on the date when the landlord is first in violation of a rent order, which establishes the existence of overcharges.

This construction is also consistent with the plain words of the Act. Congress did not use the word "violation" loosely or by mistake, intending instead

to say "overcharge." The limitation sentence referred to above declares in part:

If any person selling a commodity violates
 a * * * order * * * prescribing a maximum price * * * the person who buys
 such commodity * * * may, within one
 year from the date of the occurrence of the
violation * * * bring an action against the
 seller on account of the *overcharge* * * *.
 [Italics added.]

Reference to this limitation provision shows that Congress used the two italicized words in the same sentence for different purposes, keeping distinctly in mind their difference in meaning. The same distinction is carried out in several other portions of the section. In each instance, "violation" was used as indicating the point from which the statute begins to run, and "overcharge" as indicating the basis for, and partial measure of, damages in the action.

To adopt the defendant's reasoning, however, would require us to say that Congress intended the word "violation" to mean "overcharge" despite the careful differentiation between them. We may not assume that in using two different words in the same section, Congress intended to convey the same meaning for both words.

The decision below gives effect to the intent of Congress as evidenced by the plain language used. The same conclusion was reached by the Fourth Circuit Court of Appeals in *Creedon v. Babcock*, 163 F. 2d 480. There, too, the question was squarely raised whether the statute of limitations ran from the time

when rent was collected, or from the time when a landlord had refused to comply with a retroactive rent reduction order. Reversing the judgment below, which in effect held that the statute of limitations ran from the time of collection of rent, the Court said as follows (p. 483):

It should be noted at the outset that the validity of the order of December 30, 1944, is not before us since that question could not be raised in the court below. *Bowles v. Meyers*, 149 F. 2d 440; *Porter v. Eastern Sugar Associates*, 159 F. 2d 299. Failure to register gave no right to sue and therefore does not govern the limitation period. Compare *Rawlings v. Ray*, 312 U. S. 96. Until the last day on which refund could be made in compliance with the O. P. A. order, that is, 30 days after the order was issued, or January 30, 1945, there could be no violation. This must be so since a refund payment prior to that date would have been in full compliance with the order and hence would have given no foundation for suit. It follows necessarily from the plain and imperative words of the Act—"within one year from the date of the occurrence of the violation"—that the limitation period started the day following January 30, 1945, which was the date of the occurrence of the violation * * *. It becomes apparent upon a close reading of the Act, that the word *violation* is used in a sense that is quite separate and distinct from the word *overcharge*. Particularly significant is the first sentence of Section 205 (e) quoted above: "If any person selling a commodity violates a * * *

order * * * prescribing a maximum price
 * * * the person who buys such commodity
 * * * may, within one year from the date of
 the occurrence of the *violation* * * * bring
 an action against the seller on account of the
overcharge * * *.” Violation is used to indicate the point from which the statute begins to run, whereas overcharge indicates the basis of, and the yardstick for, damages * * *. We think the language of the Act makes a clear distinction between *violation* and *overcharge*. We conclude, therefore, that none of the claim here involved is barred by the statute of limitations. This conclusion fully accords with the generally established rule that a limitation period begins to run only *after* the accrual of the right to prosecute a claim or cause of action. 34 Am. Jur. (Limitation of Action), Sec. 113. There was no such right here until the “occurrence of the violation,” and that, as we have pointed out, did not come into being until Babcock refused to comply with the order of December 30, 1944.

The great weight of authority is in accord with this decision of the Fourth Circuit Court of Appeals (*Bowles v. Gotterdam*, 72 F. Supp. 1022 (S. D. Ohio); *Porter v. Butts*, 68 F. Supp. 516 (S. D. Ohio); *Haber v. Garthly*, 67 F. Supp. 774 (E. D. Pa.); *Porter v. Sandberg*, 69 F. Supp. 29 (W. D. Ark.); *Parham v. Clark*, 68 F. Supp. 17 (E. D. Mich.); *Fleming v. Schleicher*, 72 F. Supp. 895 (D. C. Md.); *Porter v. Kaibel*, 5 OPA Op. & Dec. 5117 (D. C. Minn.); *Bowles v. Buckner* (W. D. Wash.), decided February 12, 1946, No. 1281, not reported).

The contrary position has been taken in two cases (*Creedon v. Stone*, 163 F. 2d 393 (C. C. A. 6th)), petition for certiorari granted December 8, 1947, but not yet acted upon; and *Thompson v. Taylor*, 62 F. Supp. 930 (S. D. Fla.).

In *Creedon v. Stone*, *supra*, the Sixth Circuit, holding that the limitation period ran from the time when the rent was collected, said the following (p. 395):

Read in the ordinary sense, as applied to the payment of rent, Section 205 (e) plainly provides that each separate overcharge is the violation referred to. Each separate overcharge is certainly a violation of the regulation or order "prescribing a maximum price," and each separate overcharge gives rise to a cause of action for the violation. *Gilbert v. Thierry*, 58 F. Supp. 235 (D. C. Mass.), affirmed *Thierry v. Gilbert*, 147 F. 2d 603, 604 (C. C. A. 1st). There is no merit in the contention that the violation upon which this cause of action is based is the failure or refusal to make the refund. Such a failure or refusal is a violation of Section 4 (e) of the Rent Regulation for Housing, and if a refund order is issued by the Administrator, it is a violation of the order, but such failure or refusal is not the violation specified in Section 205 (e), which is the violation of the "maximum price regulation" or order. To causes of action based on these overcharges, since they are violations under Section 205 (e), the one-year statute of limitations applies.

The opinion of the Sixth Circuit is wrong in many respects.

1. First, reliance on *Gilbert v. Thierry*, 58 F. Supp. 235 (D. C. Mass.), is misplaced. In the usual case where no retroactive order of the Area Rent Director is involved, and where the landlord merely charges more rent than the maximum rent established by the Regulation on the maximum rent date, the violation occurs at the same time that the excess rent is collected. That is the case of which *Gilbert v. Thierry* is typical. In such a case, it is true that the statute of limitations would run from the time of collection of rent. The instant case does not involve such a situation. Here, at the time of collection of rent after the first rental, it is uncertain whether any order of reduction of the maximum rental will ever be entered. If no order of reduction is entered, the original rent remains the maximum rent, and neither the tenant nor the Administrator could sue for statutory damages. If neither party could sue before the order of reduction is entered, it is clear they are barred from doing so only because no cause of action arose before the issuance of the order of reduction. If no cause of action arose before the issuance of the order of reduction, it is difficult to understand how the statute of limitations could start to run at any earlier time.

2. The decision of the *Stone* case is erroneous in still another respect. It will be noted that the Court in that case concedes that failure to refund is a violation of the retroactive rent reduction "order," but takes the position that such failure or refusal is not the violation specified in Section 205 (e), which

is the violation of the "maximum price regulation" or "order." The Sixth Circuit Court of Appeals was obviously confused in thinking an order issued by the Area Rent Director was not the kind of order specified in Section 205 (e). That it is precisely such an order is now beyond dispute. See *Bowles v. Willingham*, 321 U. S. 503, where an individual rent reduction order of an Area Rent Director was involved, and *Porter v. McRae*, 155 F. 2d 213 (C. C. A. 10th); *Bowles v. Lake Lucerne Plaza*, 148 F. 2d 967 (C. C. A. 5th), certiorari denied, 66 S. Ct. 31; *Creedon v. Babcock*, 163 F. 2d 480 (C. C. A. 4th); *Bell v. Fleming*, 159 F. 2d 416 (E. C. A.), where the validity of retroactive rent reduction orders of Area Rent Directors were considered and upheld by the Emergency Court of Appeals. See also, *Easley v. Fleming*, 159 F. 2d 422 (E. C. A.).

3. In addition, the conclusion reached by the Sixth Circuit Court is at odds with the established principle that a wrongdoer may not benefit from his own wrong. See, e. g., *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, rehearing denied, 327 U. S. 817; *R. H. Stearns Company v. United States*, 291 U. S. 54. The retroactive rent reduction order, which as we shall show in the next point, must be accepted as valid and binding for all purposes in these proceedings, is issued by the Area Rent Director only where a landlord has proceeded in disregard of the law, such as by failing to file a timely registration statement. By the landlord's delay in registering, the fact of renting is concealed from the Administrator, and investiga-

tion of the premises for review of the maximum rental is postponed. To prevent the landlord from benefiting from his own complete disregard of the Act and the Rent Regulation, the retroactive order requires him to refund to the tenant all overcharges collected during the period of noncompliance. *150 East 47th Street Corporation v. Fleming*, 162 F. 2d 206, 207 (E. C. A.). On the theory upheld by the Sixth Circuit, however, the longer the delay in registration, or "the more grievous the wrong done, the less likelihood there would be of a recovery." *Bigelow v. RKO Radio Pictures, Inc.*, *supra*. To allow hundreds of landlords to escape liability under the Emergency Price Control Act and under the Housing and Rent Act of 1947 because of their own inaction or wilful concealment and wrongdoing, is bound not only to invite disregard of the provisions of the Housing and Rent Act of 1947, but also to breed contempt for law generally.

It is for these reasons that the Solicitor General has agreed to apply to the Supreme Court for certiorari in the *Stone* case. The petition for certiorari was filed on October 6, 1947, and certiorari was granted December 8, 1947.

B. Even if the statute of limitations is construed to start running from the date of the overcharge, no part of this claim would be barred in any event because the failure to refund is the overcharge

Even if the assumption of the Court below is accepted, that the statute starts running at the time of the "overcharge," rather than the "violation," it is submitted that the overcharge occurred at the time of the failure to refund, rather than at the time the

rent was collected. Under the terms of the Regulation, the rent collected by the landlord is not irrevocably received, but is received subject to an obligation to refund the excessive portion thereof if the rent is subsequently determined by the Administrator to be too high. This specific provision must be deemed to be incorporated by reference into the landlord's contract with the tenant; the rent collected after the reduction of services is received only tentatively until the order is issued establishing the maximum rent. Putting it another way, "overcharge" is defined in Section 205 (e) of the Act as "the amount by which the consideration exceeds the applicable maximum price," and the consideration is not finally determined until it is known whether the landlord will or will not refund. Again, there is no actually ascertained "charge" until the amount of rent that is to be retained by the landlord is determined, and hence, no "overcharge" until the period authorized for refund has expired. This is true only because the Regulation expressly renders nonviolative the receipt of more than the subsequently determined ceiling rent, provided that timely refund is made. The landlord has not overcharged until the maximum rent is reduced retroactively, for until that time, the maximum rent was the rent charged on the first renting. Until the order was issued, there was neither an overcharge nor a violation, except the violation of failing to register, which as mentioned above is not the basis of the present action. *Creedon v. Babcock, supra*. To repeat, the basis of this action is the refusal to

obey the retroactive rent reduction order, and this order, as we shall now show, must be accepted as binding and valid here in all respects and for all purposes in these proceedings.

II

In accepting the order of the area rent director dated October 31, 1945, as valid and binding in all respects and for all purposes in the proceedings before it, the court below properly complied with section 204 (d) of the act, which gives the Emergency Court of Appeals exclusive jurisdiction over questions relating to validity of orders

Pursuant to decisions of the Supreme Court and of this Court, the District Court properly accepted the order of the Area Rent Director as valid in all respects and for all purposes in these proceedings. Any question of the validity of the Rent Regulation or of the individual rent reduction orders issued pursuant thereto in the case at bar, on the ground of improper retroactivity or any other constitutional or statutory ground, was withdrawn from the jurisdiction of the lower Court and committed to the exclusive jurisdiction of the Emergency Court of Appeals by Section 204 (d) of the Act (App. 24). *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660; *Bowles v. Wiltingham*, 321 U. S. 503, 64 S. Ct. 641; *Case v. Bowles*, 66 S. Ct. 438; *Martini v. Porter*, 157 F. 2d 35 (C. C. A. 9th), certiorari denied, 67 S. Ct. 1091; *Rosensweig v. United States*, 144 F. 2d 308 (C. C. A. 9th), certiorari denied, 65 S. Ct. 117; *Shyman v. Fleming*, 163 F. 2d 461 (C. C. A. 9th); *United States v. Fish*, 154 F. 2d 798 (C. C. A. 2d), certiorari denied, 66 S. Ct.

1377; *Fleming v. Dashiell*, 161 F. 2d 612 (C. C. A. 9th).
 “* * * Where an order upon its face is clearly applicable, any failure by the district court to enforce it is in legal effect the equivalent of declaring the order invalid. This the district court has no power to do” (*Fleming v. Dashiell*, *supra*, 158 F. 2d at p. 613, footnote 2).

The exclusive jurisdiction clause protects “any regulation or order issued under Section 2,” thereby extending to all orders establishing maximum prices or rents, whether they be established directly in broad regulations (under Sections 2 (a) and 2 (b)), or established separately for individual sellers or landlords, pursuant to authority of the broad regulation (Section 2 (c) of the Act) (App. 23). The significant reasons noted by the Supreme Court in the *Yakus* case, *supra* (321 U. S. 414), for the exclusive jurisdiction plan—e. g., need for uniformity of decision; necessity of avoiding delayed or unequal control and enforcement; importance of fully utilizing the Administrator’s specialized experience—all apply as fully to individual orders as they do to orders of general applicability. The Supreme Court itself has held that objections to validity of an individual rent order issued by the Area Rent Director could be made only in the Emergency Court. *Bowles v. Willingham*, 321 U. S. 503, 509–510, 521.² Those Circuit Courts of Appeals in which

² “Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by Section 204. *Yakus v. United States*, *supra*” (*Bowles v. Willingham*, *supra*, 321 U. S. at p. 521).

the question has arisen have decided similarly. *Bowles v. Lake Lucerne Plaza*, 148 F. 2d 967 (C. C. A. 5th), certiorari denied, 66 S. Ct. 31; *Creedon v. Babcock*, 163 F. 2d 480 (C. C. A. 4th); *Bowles v. Meyers*, 149 F. 2d 440 (C. C. A. 4th); *Porter v. McRae*, 155 F. 2d 213 (C. C. A. 10th); and so, too, have the Federal district courts (*Haber v. Garthly*, 67 F. Supp. 774 (E. D. Pa.); *Parham v. Clark*, 68 F. Supp. 17 (E. D. Mich.)). The Emergency Court of Appeals has taken jurisdiction of protest proceedings against (and has upheld) individual reductions of rent issued by Area Rent Directors which were retroactive in operation. *Womac v. Bowles*, 146 F. 2d 497 (E. C. A.); *Bell v. Fleming*, 159 F. 2d 416 (E. C. A.); see too, *Polis v. Creedon*, 162 F. 2d 908 (E. C. A.).

Defendant was not thereby deprived of the opportunity to raise any objections he might have to the validity or fairness of the rent-reduction order. However, any such objections could be raised only through the protest procedure and in the Emergency Court, pursuant to Sections 203 and 204 of the Act. *Bowles v. Seminole Rock and Sand Company*, 325 U. S. 410, 418-419; *Yakus v. United States*, *supra*; *Bowles v. Willingham*, *supra*.

CONCLUSION

It is respectfully submitted that the judgment below be affirmed.

Respectfully submitted.

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APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. *Emergency Price Control Act of 1942*, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App. Supp. II, Secs. 901 et seq.).

SECTION 2 (b) :

“(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in

such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. * * *

SECTION 2 (c):

“(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating

costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

SECTION 2 (g):

"(g) Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

SECTION 4 (a):

"(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

SECTION 201 (d):

"(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

SECTION 204 (d):

"* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any

regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provisions of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

SECTION 205 (e):

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the

occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.

"If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending

on the date of enactment of this Act and with respect to proceedings instituted thereafter.]”

2. *Rent Regulation for Housing* (8 F. R. 7322).

SECTION 1 (a):

“§ 1. Scope of this regulation—(a) Housing and defense-rental areas to which this regulation applies.—This regulation applies to all housing accommodations within each of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the ‘defense-rental area’), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section.”

SECTION 2 (a):

“§ 2. Prohibition against higher than maximum rents—(a) General prohibition.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.”

* * * * *

SECTION 4:

“§ 4. Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

“(a) *Rented on maximum rent date.* For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.”

* * * * *

“(e) *First rent after effective date.* For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting, the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

“If the landlord fails to file a registration statement within the time specified, the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, or the effective date of regulation, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1).

“In such case, the order under section 5 (c) (1) shall be effective to decrease the maximum rent from the date of such first renting or from the beginning of the first rental period on or after October 1, 1943, or the effective date of regulation, whichever is the later. The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the act for failure to file the registration statement required by section 7.”

SECTION 5:

“§ 5. Adjustments and other determinations. In the circumstances enumerated in this section the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required.”

*

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*

“(c) *Grounds for decrease of maximum rent.* The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

“(1) *Rent higher than rents generally prevailing.* The maximum rent for housing accommodations under paragraphs (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.”

SECTION 7 (a):

“§ 7 Registration—(a) *Registration statement.* On or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented, or offered for rent, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by the regulation for such dwelling unit and shall contain such other information as the Administrator shall require.”

No. 11692

United States
Circuit Court of Appeals
For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs.
Charles W. Mapes, Charles W. Mapes, Jr.,
Gloria Mapes and Chas. W. Mapes Company,
a co-partnership.

Appellees.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 456

Upon Appeal from the District Court of the United States
for the District of Nevada

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PAUL P. O'BRIEN,

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No. 11692

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the District of Nevada

No. 552

P. G. DENSON,

Plaintiff,

vs.

IRENE GLADYS MAPES, also known as MRS.
CHARLES W. MAPES, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY, a co-partnership,
Defendants.

AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE

Now Comes the above named plaintiff by leave of
Court first had and obtained, and files this, his
amended complaint, against the above named de-
fendants, and for cause of action alleges:

I.

That during all the times mentioned herein the
above named plaintiff has been, and now is, a citizen
and resident of the State of California. That during
all the times mentioned herein the said defendants
have been, and now are, citizens and residents of
the State of Nevada. That during all of the times
mentioned herein each of said defendants has been,
and is now, [14] a citizen and resident of the State
of Nevada. That the defendant, Chas. W. Mapes
Company, consisting of the defendants, is a co-
partnership organized and existing under the laws

of Nevada. That the matter involved in controversy herein exceeds the sum and amount of Three Thousand (\$3,000.00) Dollars.

That the said defendant, Charles W. Mapes, Jr., has declined and refused, and still declines and refuses to join as a party plaintiff herein. That he is the son of the defendant, Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, and has conspired and confederated with the said defendants, Irene Mapes, Gloria Mapes, and said co-partnership, to defeat the said plaintiff out of his just rights and equities herein. That his interests herein are antagonistic and adverse to plaintiff. That the said Charles W. Mapes, Jr., is a necessary, proper and indispensable defendant herein.

II.

That plaintiff is informed and believes, and upon information and belief states the fact to be, that the said defendant, Chas. W. Mapes Company, a co-partnership, was organized on or about the 9th day of November, 1943, and ever since has been, and now is, conducting, carrying on and transacting business, and has never since been dissolved.

III.

That the above named defendant, Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, was, on the 24th day of September, 1945, at which time and date the agreements hereinafter alleged and attached hereto as Exhibit "A" was entered into, seized in fee of that certain real property situated

at the Southeast corner of Virginia and First Streets, in the City of Reno, Nevada, having a frontage on Virginia Street of [15] 167.64 feet, and a frontage on First Street of 139.55 feet.

IV.

Plaintiff is informed and believes, and upon information and belief states the fact to be, that on or about the 6th day of November, 1945, the said defendant, Irene Gladys Mapes, conveyed by deed of conveyance to Mrs. Charles W. Mapes, Charles W. Mapes, Jr., and Gloria Mapes, co-partners doing business under the name of Chas. W. Mapes Company of Reno, Nevada, the lands and premises and real estate described in said agreement of September 24, 1945. That said conveyance at the time of its execution and prior thereto was made with knowledge by all the defendants of the existence of said agreement.

V.

That on or about the 24th day of September, 1945, the above named plaintiff and the above named defendants, Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, and Charles W. Mapes, Jr., entered into a written agreement, whereby the above named defendant, Irene Gladys Mapes, agreed to grant a lease to the said plaintiff and to the said defendant, Charles W. Mapes, Jr., and the said plaintiff and the said defendant, Charles W. Mapes, Jr., agreed to receive a lease from the said defendant, Irene Gladys Mapes, of a certain new fireproof

hotel, apartment, store building and garage to be erected by said defendant, Irene Gladys Mapes, on said lands and premises hereinabove described, excepting from said lease eight (8) store spaces on Virginia Street and three (3) store spaces on First Street; a copy of which said written agreement is attached hereto, marked Exhibit "A", made part hereof, and to which reference is hereby made. That said agreement is certain, [16] definite, just, reasonable, and mutual in its obligations and in all its parts.

That the rental prices and consideration for the use and occupancy of said building, with the exceptions above noted, to be expressly set forth in said lease, and which are expressly set forth in said written agreement, together with the time of payment, is as follows:

- 5% of gross receipts from foods sales.
- 10% of gross receipts from liquors, wines and beer sales.
- 30% of gross receipts from hotel, rooms and apartments.
- All rents payable monthly.

Provided, that in the event the said percentage of gross receipts shall not equal monthly:

For Coffee Shop, Dining Room and Kitchen	\$ 600.00
For Lounge	1000.00
For Sky Room	333.33
For Mezzanine Floor, Banquet Room....	150.00

Then in such case, the said tenants shall make up and pay the said deficiency on any of the said four classifications so failing.

Plaintiff further alleges that the said written agreement likewise expressly provides the term of said lease, to wit:

“That the period of said lease shall be not less than Twenty (20) years from the date the premises are in condition for possession thereof to be delivered.”

Plaintiff further alleges that the said written agreement likewise expressly provides the time of the payment of said rental, namely, “monthly.”

Plaintiff further alleges that the said written agreement expressly acknowledges “valuable and sufficient consideration present and received.”

VI.

Plaintiff further alleges that in addition to the sum of Ten Thousand (\$10,000.00) Dollars in cash paid by the said plaintiff to the said defendant, Irene Gladys Mapes, on October 4, 1945, and in addition to the other considerations set forth in said agreement, the said plaintiff, at the request of the defendant, Irene Gladys Mapes, engaged an architect and contractor now constructing the hotel building upon said premises, conferred upon many occasions with said architect, with the contractor employed on the work, and with members of their official staffs, with the defendants, and expended the necessary time and expense for attendance upon said conference.

~~Further, the said plaintiff, at the request of the defendant, Irene Gladys Mapes, secured a large and appreciable loan for the said defendants, to finance the construction of the said hotel building, which the said defendant, Irene Gladys Mapes, informed plaintiff she was unable successfully to negotiate through other channels.~~

Further the said plaintiff, at the request of the defendant, Irene Gladys Mapes, attempted to secure a large and appreciable loan for the said defendants to finance the construction of the said hotel building, which the said defendant, Irene Gladys Mapes, informed the plaintiff she was unable to successfully negotiate through other channels. That said plaintiff entered into such negotiations with financially responsible persons and was assured by them and plaintiff in turn assured Mrs. Mapes, that he was able to secure the loan.

This amendment was allowed by Order of Court of Oct. 28, 1946.

/s/ O. F. PRATT,
Deputy Clerk.

VII.

Plaintiff further alleges that in order to carry out the terms, conditions and covenants of said agreement, by way of part performance thereof on his part, and all within the knowledge of said defendants, and each of them, this plaintiff obtained plans, specifications and prices from various firms on furnishings, equipment, accessories and supplies to be

installed in said hotel at the cost and expense of plaintiff and defendant, Chas. W. Mapes, Jr. [18]

As a further consideration, the above named plaintiff, relying on the good faith of said defendants, and with their knowledge, sold, at considerable financial sacrifice, a hotel of which he was the sole owner and proprietor.

That the good and valuable considerations, in said agreement provided, and hereinabove alleged, were, and are, fair, just and equitable to said defendants herein, and each of them.

VIII.

~~That said agreement, Exhibit "A", was prepared by the attorney for the defendants, executed by the said defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., sent to the plaintiff by mail to Los Angeles, California, promptly signed and executed by him and promptly returned by mail to the attorney for the said defendants. That since the execution of said agreement plaintiff has always been ready and willing to receive from the defendant, Irene Gladys Mapes, a lease of said hotel structure whenever tendered, or to join in the execution of such a lease, and defendants have been so informed and advised by plaintiff.~~

Par. 8. That said agreement, Exhibit A, was prepared by the attorney for defendant, executed by the said defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., sent to the plaintiff by mail to Los Angeles, California, and later signed and

executed by the plaintiff in the office of H. R. Cooke, attorney for the defendants, at Reno, Nevada.

This amendment was allowed by Order of Court of Oct. 28, 1946.

/s/ O. F. PRATT,
Deputy Clerk.

IX.

That while said agreement provides that the parties thereto shall immediately enter into a discussion with each other as to the terms, conditions and details of said lease, and that said terms, conditions and details shall be mutually agreed upon between the parties hereto within ten (10) days after the written contract for the construction of said structure has been entered into by the first party, and within ten (10) days after the actual construction has been commenced, and while there is a provision in said agreement that time is [19] the essence thereof, this plaintiff alleges that the said defendants, by word, act and conduct upon the part of each and all of them have waived such time provisions, and with intention so to waive, and with knowledge, understanding and recognition of such waiver; and each and all of them are estopped and foreclosed from disclaiming said waiver, or asserting, or claiming, or relying upon, said time provisions, or any of them. Repeatedly since the execution of said agreement, and for a continuous period following the expiration of the time provisions hereinabove referred to, the said defendants, by

word, acts and conduct have led this plaintiff to believe that such a lease would be tendered and would be properly executed by all of the parties hereto, and plaintiff placed full reliance on defendants' said word, acts and conduct. That almost continuously, from the 24th day of September, 1945, the date of the execution of said agreement, up to and including the 1st day of April, 1946, all of the parties hereto have been conferring at various times and intervals, and have treated and considered during all of said period of time, said agreement in continuous full force and effect, with the belief on the part of plaintiff, and representation by the said defendants that they were acting in good faith, and would tender and execute said lease. That on or about the 28th day of December, 1945, plaintiff, at the request of defendants, met the defendant, Charles W. Mapes, Jr., at the office of the architect of said hotel building in Oakland, California, for the purpose of discussing some changes in the plans for said building. During the month of March, 1946, plaintiff conversed by phone between Los Angeles and Reno with the defendant, Irene Gladys Mapes, about the hotel [20] and the plans therefor. Plaintiff also told her that he would call the defendant, Charles W. Mapes, Jr., the next day and ask him to come to Los Angeles to look over plans for furniture and interior decorating. Later, by appointment between plaintiff and the defendant, Charles W. Mapes, Jr., plaintiff met the said defendant on or about April 1, 1946, together with an interior decorator of Barker Bros., Los Angeles, California, at

the office of the architect of said hotel structure in Oakland, California.

During the first part of January, 1946, plaintiff went to San Francisco and interviewed the Dohrmann Hotel Supply Company and instructed said company to get out plans for new equipment, designs and prices for dining rooms, kitchens, bars, and other matters appertaining to hotel equipment, all of which these defendants well knew. That in the same month of January, 1946, plaintiff came to Reno and conferred with the defendant, Irene Gladys Mapes, at her home in Reno, Nevada. That upon said interview the said defendant, Irene Gladys Mapes, expressed pleasure with the progress being made.

X.

That during the period of time from September 24, 1945, the date of the execution of said agreement, up to and including about the 10th day of April, 1946, the said defendants retained plaintiff's Ten Thousand (\$10,000.00) Dollar cash deposit, never once during that interval of time offered to return it, nor did any one of said defendants during that interval of time, by word, act or conduct, lead this plaintiff to believe that said agreement would be repudiated, and that they would not enter into and execute the lease as in said agreement provided.

XI.

That in further recognition of the waiver by defendants of the time element hereinabove set forth

and the estoppel herein, the said defendants caused to be published in local newspapers and trade journals, featured and prominent illustrated articles stating that plaintiff would conduct and operate said hotel.

XII.

Plaintiff further alleges that a lack of observance and performance of the time elements in said agreement above referred to, was the fault of the said defendants and not of this plaintiff. That though plaintiff told defendants he was ready to sign a lease whenever they should prepare and submit it, no form of lease was ever tendered plaintiff by defendants, or any of them. That though the defendants had superior knowledge as to when final plans for said hotel structure were approved and when actual construction commenced, yet none of them disclosed said facts to this plaintiff, nor was an interview or conference sought for the final preparation of the lease. Plaintiff further alleges that said defendants, and each of them, are, and were at fault, and were neglectful and delinquent in not seeking or arranging such an interview or conference within any of the periods of time set forth in said agreement.

XIII.

Plaintiff further alleges that all the material and essential provisions of the proposed lease were, and are, expressly stated and set forth in said agreement, as hereinabove more particularly alleged, and

the parties hereto expressly agreed that such material and essential provisions [22] should be contained within said lease. That all other customary matters and things usually contained in similar leases were and would be merely incidental and in accordance with custom and usage.

XIV.

Plaintiff further alleges that notwithstanding the continued acts, conduct and representations of the defendants, as above set forth, notwithstanding the binding obligations of said agreement, and the ability of the defendants to perform, the said defendants personally and through their attorney, on or about the 10th day of April, 1946, without cause or reason, repudiated said written agreement, declined and refused further performance on their part under it, and stated to plaintiff that no lease would be tendered, granted or entered into, as in said agreement provided. That no cause or reason was given plaintiff for such repudiation.

XV.

Plaintiff further alleges that he has fully and faithfully performed all acts and things, covenants and conditions in said agreement required of him to be performed, and has always been ready, willing and able, and is now ready, willing and able to enter into and execute said lease, as in said agreement provided, and fully and faithfully to perform in accordance therewith, and to comply with all of its terms, covenants agreements and conditions.

XVI.

Plaintiff further alleges that it was at the special instance and request of the defendant, Irene Gladys Mapes, that her son, Charles W. Mapes, Jr., was associated with plaintiff as a second party to said agreement. That plaintiff reposed [23] sufficient faith and confidence in the said Charles W. Mapes, Jr., to believe that he would faithfully carry out his obligations under said agreement and join with plaintiff in demanding and executing the lease, as in said agreement provided. But the said defendant, Charles W. Mapes, Jr., has wrongfully, unjustly and inequitably, and in fraud of plaintiff's rights, conspired and confederated with his co-defendants in repudiation of said agreement. That plaintiff has always been ready, willing and able, and is now ready, willing and able personally to assume, pay and perform in full all obligations, acts, or things required to be performed by the said defendant, Charles W. Mapes, Jr., under said agreement and lease, and to take and execute said lease in his own name.

XVII.

Plaintiff further alleges that he has no plain, speedy or adequate remedy at law.

XVIII.

Plaintiff further alleges that the defendants have not done equity, nor have they offered to do equity.

Wherefore, plaintiff prays that a decree for specific performance of said agreement be made and

entered herein in favor of the plaintiff and against the said defendants. That the above entitled Court order and decree that within twenty (20) days from and after the entry of said decree, or such other time as the Court may determine, the said parties hereto be ordered and directed to execute a good and sufficient lease upon the hotel property, with the exception of eight (8) store spaces on Virginia Street and three (3) store spaces on first Street, hereinabove particularly described, for a term of twenty (20) years, and for a rental price, consideration, and [24] conditions, as in said agreement provided. That said lease shall provide that the plaintiff and the defendant, Charles W. Mapes, Jr., at their own cost, provide and place in said structure such furniture, fixtures and equipment as shall be suitable, proper and necessary to furnish and equip the same as a first class hotel and apartment building, and that they shall execute and deliver to the defendant, Irene Gladys Mapes, a first chattel mortgage on said furniture, fixtures and equipment, and to be provided in said lease. That the Court further order, adjudge and decree, such other and additional provisions to be contained in said lease as to fully effectuate the intent and purposes of the parties hereto, as in said agreement stated, and also to set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected.

That the Court further order, adjudge and decree as an alternative, that if sound principles of equity would be best subserved and applied herein, that

the plaintiff, solely and on his own behalf, and the said defendants execute said lease, as aforesaid, without the joinder of the defendant, Charles W. Mapes, Jr., as co-lessee therein.

That the Court retain jurisdiction herein to assure compliance with its orders, judgment and decree.

And for such other relief as in equity may be mete and proper, and for costs.

PLATT & SINAI,
/s/ SAMUEL PLATT,
Attorneys for Plaintiff. [25]

Service of the within and foregoing Amended Complaint is hereby accepted and admitted, by copy, for and on behalf of all the above named defendants, this 29th day of July, 1946.

/s/ JOHN D. FURRH, JR.,
/s/ H. R. COOKE,
Attorney for said Defendants.

[Endorsed]: Filed July 30, 1946. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION BY DEFENDANTS TO
DISMISS AND, SUBJECT THERETO, TO
STRIKE PORTIONS OF PLAINTIFF'S
AMENDED COMPLAINT

To: Plaintiff above-named, and Messrs. Platt &
Sinai, his attorneys:

Take Notice that on the day and hour specified
in the hereunto annexed Order of the Court, at the
Federal court room at Reno, Nevada, the defend-
ants above-named will move said court for an order
or orders as follows:

I.

That plaintiff's Amended Complaint herein be
dismissed, for in that: [27]

(a) Lack of jurisdiction by the Court over
the subject matter;

(b) Failure of plaintiff's Amended Com-
plaint to state a claim upon which relief can
be granted.

II.

Subject to the foregoing, said defendants will
move the said Court at the same time and place for a
summary judgment, upon the ground that it affirm-
atively appears from plaintiff's Amended Com-
plaint and from the Affidavit of defendant Mrs.
Chas. W. Mapes annexed to the original Notice of
Motion to Dismiss herein, filed June 29, 1946, and

the Supplemental Affidavit of Mrs. Chas. W. Mapes in support of defendants' Motion to Dismiss Amended Complaint or for Summary Judgment of Dismissal, annexed hereto, marked Exhibit B and made a part hereof, together with the affidavits of Gloria Mapes and H. R. Cooke, both annexed to said original Notice of Motion, that plaintiff is entitled to no relief, and that defendants are entitled to a summary judgment that the action be dismissed with prejudice.

III.

Subject to the foregoing, said defendants will, at the same time and place, move said Court for an Order or orders striking the portions of said Amended Complaint designated as follows:

1. Commencing with the word "That" in line 8, page 2, of said Amended Complaint, to and including the word "plaintiff" in line 14, said page, on the grounds said matter is redundant; is immaterial; is impertinent.

2. Commencing with the word "That" in line 30, page 3, of said Amended Complaint, to and including the word "parts" in line 2, page 4, on the grounds first above stated. [28]

3. Commencing with the word "and" in line 8, page 5, of said Amended Complaint, to and including the word "channels" in line 21, said page, on the grounds first above stated.

4. Commencing with the word "Plaintiff" in line 23, page 5, of said Amended Complaint, to and

including the word "jr." in line 30, said page, on the grounds first above stated.

5. Commencing with the word "As" in line 1, page 6, of said Amended Complaint, to and including the word "them" in line 8, said page, on the grounds first above stated.

6. Commencing with the word "That" in line 22, page 6, of said Amended Complaint, to and including the word "them" in line 8, page 7, on the grounds first above stated.

7. Commencing with the word "Repeatedly" in line 8, page 7, of said Amended Complaint, to and including the word "lease" in line 23, said page, on the grounds first above stated.

8. Commencing with the word "That" in line 23, page 7, of said Amended Complaint, to and including the word "California" in line 9, page 8, on the grounds first above stated.

9. Commencing with the word "During" in line 10, page 8, of said Amended Complaint, to and including the word "Made" in line 19, said page, on the grounds first above stated.

10. Commencing with the word "That" in line 21, page 8, of said Amended Complaint, to and including the word "provided" in line 30, said page, on the grounds first above stated.

11. Commencing with the word "That" in line 2, page 9, [29] of said Amended Complaint, to and including the word "hotel" in line 7, said page, on the grounds first above stated.

12. Commencing with the word "Plaintiff" in line 9, page 9, of said Amended Complaint, to and including the word "agreement" in line 25, said page, on the grounds first above stated.

13. Commencing with the word "Plaintiff" in line 27, page 9, of said Amended Complaint, to and including the word "usage" in line 4, page 10, on the grounds first above stated.

14. Commencing with the word "notwithstanding" in line 6, page 10, of said Amended Complaint, to and including the word "perform" in line 9, said page, on the grounds first above stated.

15. Commencing with the word "That" in line 15, page 10, of said Amended Complaint, to and including the word "repudiation" in line 16, said page, on the grounds first above stated.

16. Commencing with the word "Plaintiff" in line 27, page 10, of said Amended Complaint, to and including the word "name" in line 13, page 11, on the grounds first above stated.

On the hearing defendants will use and refer to plaintiff's Amended Complaint and to the said Affidavits of Mrs. Chas. W. Mapes, and also to said Affidavits of Gloria Mapes and H. R. Cooke.

Dated: August 31, 1946.

H. R. COOKE,

JOHN D. FURRH, JR.,

Attorneys for Defendants.

EXHIBIT B

In the District Court of the United States
In and for the District of Nevada

P. G. DENSON,

Plaintiff,

vs.

IRENE GLADYS MAPES, also known as MRS.
CHARLES W. MAPES, CHARLES W.
MAPES, JR., GLORIA MAPES and CHAS.
W. MAPES COMPANY, a Co-Partnership,
Defendants.

SUPPLEMENTAL AFFIDAVIT OF MRS.
CHAS. W. MAPES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT, OF FOR SUM-
MARY JUDGMENT

State of Nevada,
County of Washoe—ss.

Mrs. Chas. W. Mapes, being first duly sworn,
says: That she is one of the defendants named in
the within entitled action and makes this affidavit
on behalf of herself and her co-defendants:

That she has read the "Amended Complaint for
Specific Performance" of plaintiff in the above-
entitled action;

That referring to Paragraph VI of said Amended
Complaint affiant denies that at her request the
plaintiff engaged an architect and contractor now
constructing said hotel building, and denies that

the architect and contractor now constructing said hotel building was engaged by the said plaintiff either with or without the request of said defendant; affiant also denies that [31] the plaintiff at the request of this affiant, or at all, secured a large and appreciable loan, or any loan whatsoever, for said defendants to finance said hotel construction, and denies that she ever informed plaintiff she was unable successfully to negotiate a loan through other channels.

With regard to the allegations of Paragraph VII of said Amended Complaint, affiant denies that within the knowledge of the defendants or any of them the plaintiff obtained specifications and prices of various firms as alleged in said paragraph, and denies that plaintiff, with the knowledge of defendants, sold at considerable financial sacrifice, or at all, an hotel of which he was the owner.

With reference to the allegations of Paragraph IX of said Amended Complaint this affiant denies the whole thereof.

Affiant also denies the allegations of Paragraph XI of said Amended Complaint.

Referring to the allegations of Paragraph XII of the said Amended Complaint affiant admits that no proposed formal lease was ever tendered plaintiff by defendants, and affiant denies all the remaining allegations of said paragraph.

Referring to the allegations of Paragraph XIV of said Amended Complaint affiant denies that de-

defendants' refusal to execute any lease to the plaintiff was without cause or reason, and denies that no cause or reason was given plaintiff for such refusal; affiant also denies the allegations of Paragraph XV of said Amended Complaint.

Referring to the allegations of Paragraph XVI of said Amended Complaint, affiant denies that it was at the special instance or request of this defendant that her son Charles W. Mapes, Jr., be associated with plaintiff as a second party to [32] said agreement of September 24, 1945, and as to whether plaintiff reposed sufficient or any faith and confidence in the said Charles W. Mapes, Jr., as alleged, affiant is without information or knowledge sufficient to base a belief, and denies the remaining allegations of said paragraph.

MRS. CHAS. W. MAPES.

Subscribed and sworn to before me this 31st day of July, 1946.

[Seal] B. C. YPARRAGUIRRE,
Notary Public. [33]

On application of defendants' attorneys

It Is Ordered that the time of hearing the foregoing Motion is hereby set for Sept. 11, 1946, at the hour of 2:00 o'clock p.m. at the Federal Building, at Reno, Nevada; and

Further Ordered that a copy of the foregoing, with the Affidavit, Exhibit B referred to, be served

upon plaintiff at least 20 days before said hearing date.

Dated: August 1, 1946.

ROGER T. FOLEY,
District Judge.

Service, by copy, of the foregoing Notice of Motion, together with Exhibit B attached thereto, and the Order of Court, admitted this 1st day of August, 1946.

PLATT & SINAI,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [34]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE

Come now the above-named defendants and file this their Answer to the Amended Complaint, and admit, deny and allege as follows:

I.

Answering the allegations of Paragraph I of said Amended Complaint, the defendants admit the same, except that defendants deny that said defendant Charles W. Mapes, Jr., has conspired or confederated with the said defendant Irene Gladys Mapes or with the defendant Gloria Mapes or with the defendant co-partnership, or with anyone whom-

soever to defeat the said plaintiff out of his just rights or equities herein or for any purpose whatsoever. [35]

II.

Answering the allegations of Paragraph II of said Amended Complaint, the defendants admit the same.

III.

Answering the allegations of Paragraph III of said Amended Complaint, the defendants admit the same, except that defendants deny that said defendant Irene Gladys Mapes was the owner of 167.64 feet frontage on Virginia street as alleged, and deny said defendant owned to exceed 155.64 feet frontage on said Virginia street.

IV.

Answering the allegations of Paragraph IV of said Amended Complaint, the defendants admit the same, except that said defendants deny that the conveyance mentioned in said Paragraph IV, at the time of its execution or prior thereto, was made with knowledge by all of the defendants of the existence of said agreement of September 24, 1945, identified as Exhibit A; deny that the defendant Gloria Mapes had any knowledge of the existence of said agreement any time prior to November 6, 1945.

V.

Answering the allegations of Paragraph V of said Amended Complaint, the defendants deny that on or about September 24, 1945, or at any time, the

defendant Irene Gladys Mapes, also known as Mrs. Chas. W. Mapes, and Charles W. Mapes, Jr., entered into a written or any agreement whereby the above-named defendant Irene Gladys Mapes agreed to grant a lease to the said plaintiff and to the said defendant Charles W. Mapes, Jr.; deny that the said plaintiff and the said defendant Charles W. Mapes, Jr., agreed to receive a lease from the said defendant Irene Gladys Mapes of a certain new fire proof hotel, apartment, store building or garage [36] to be erected by said defendant Irene Gladys Mapes on the lands described; deny that said agreement Exhibit A is certain, or definite or just or reasonable or mutual in its obligations or in all its material parts.

VI.

Answering the allegations of Paragraph VI of said Amended Complaint, the defendants deny that at the request of the defendant Irene Gladys Mapes, the plaintiff engaged the architect and/or contractor now constructing the hotel building on said premises; as to whether the plaintiff conferred upon many or any occasions with the said architect, or with the contractor employed on the work, or with members of their official staffs, or as to whether plaintiff expended the necessary or any time or expense for attendance upon said conferences, the defendants are without knowledge or information sufficient to form a belief as to the truth of said averments.

And defendants deny that said plaintiff conferred

upon many occasions or at all with the defendants or any of them, except informally and on a few occasions with the defendants Mrs. Chas. W. Mapes and Charles W. Mapes, Jr.; deny that the said plaintiff, either with or without the request of the defendant Irene Gladys Mapes, secured a large or appreciable loan for the said defendants to finance the construction of the said hotel building and deny that the defendant Irene Gladys Mapes ever informed plaintiff she was unable to successfully negotiate the loan referred to through other channels.

VII.

Answering the allegations of Paragraph VII of said Amended Complaint, the defendants aver they are without knowledge or information sufficient to form a belief respecting the same, [37] except that defendants deny that the alleged good and valuable considerations in said agreement provided and as alleged in said Amended Complaint, were or are fair, just or equitable to the defendants herein or any of them.

VIII.

Answering the allegations of Paragraph VIII of said Amended Complaint, the defendants deny that said Agreement Exhibit A was prepared by the attorney for the defendants, except that defendants admit that their attorney copied from a type-written document furnished him by the plaintiff and in making such copy or redraft said attorney merely

changed the wording to more nearly conform to legal phraseology, and except further that with the precedent approval of plaintiff and defendants Mrs. Chas. W. Mapes and Charles W. Mapes, Jr., said attorney added Paragraph 10 thereto; deny that said Exhibit A after being signed by plaintiff was promptly or at all returned by mail to the attorney for said defendants; that as to whether since the execution of said Exhibit A the plaintiff has always or at all been ready or willing to receive from the defendant Irene Gladys Mapes a lease of the said hotel structure whenever tendered, or to join in the execution of such a lease, the defendants are without knowledge or information sufficient to form a belief; deny that defendants have been informed or advised by plaintiff as to his alleged readiness and willingness.

IX.

Answering the allegations of Paragraph IX of said Amended Complaint, the defendants deny that they or any of them by word, or by act or by any conduct, or in any manner whatsoever on the part of the said defendants or any of them, have waived the provisions of said Exhibit A respecting said requirement that the [38] parties thereto should immediately enter into a discussion with each other as to the terms, conditions and details of said lease and the requirement that a lease should be given by the defendant Irene Gladys Mapes to the plaintiff and the said Charles W. Mapes, Jr., provided that the terms, conditions and details of said lease

could be mutually agreed upon between the parties thereto within 10 days after the actual construction of the hotel building had been commenced; deny that said defendants, in the manner alleged, or at all, had intentions to waive said requirements or that defendants had knowledge, understanding or recognition of the alleged or any waiver; deny that said defendants or any of them are estopped or foreclosed from disclaiming the alleged or any waiver, or from asserting or claiming, or relying upon, the said provisions in Exhibit A or any of them; deny that since the execution of said agreement, or for a continuous or other period following the expiration of the said time provisions, the defendants by words or acts or conduct led plaintiff to believe that such a lease would be tendered and would be properly executed by all or any of the parties thereto or hereto; deny that plaintiff placed full or any reliance on defendants' alleged word, acts or conduct; deny that almost continuously or otherwise from September 24, 1945, up to and including April 1, 1946, all or any of the parties to the said suit conferred at various times and intervals, except informally and on a few occasions; deny that all of the parties hereto at all or any of the times since September 24, 1945, to April 1, 1946, have treated or considered said Exhibit A in continuous full force and effect or of any force or effect, except that the defendants Mrs. Chas. W. Mapes and Charles W. Mapes, Jr., did not declare any refusal to proceed further under said Exhibit A until on or about April 1, 1946, and finally on

April 10, 1946, [39] when defendant Mrs. Chas. W. Mapes was notified by the said Charles W. Mapes, Jr., that he would not sign the proposed lease with said plaintiff as co-lessee; defendants are without knowledge or information sufficient to form a belief as to whether plaintiff believed from September 24, 1945, up to and including April 1, 1946, that defendants would tender or execute said lease; deny that the alleged or any representations were made by defendants to the effect that they were acting in good faith; deny that on or about December 28, 1945, at the request of the defendants or any of them, the plaintiff met the defendant Charles W. Mapes, Jr., at the office of the architect of said hotel building at Oakland for the purpose of discussing some changes in the plans for said building, or for any purpose whatsoever; deny that during the month of March, 1946, plaintiff conversed by phone between Los Angeles, California, and Reno, with the defendant Irene Gladys Mapes about the hotel or the plans therefor; deny that at said time plaintiff told the defendant Irene Gladys Mapes that he would call the defendant Charles W. Mapes, Jr., the next day and ask him to come to Los Angeles to look over plans for furniture and interior decorating; admit that by appointment between plaintiff and Charles W. Mapes, Jr., plaintiff met defendant Charles W. Mapes, Jr., on or about April 1, 1946, together with an interior decorator of Barker Bros., Los Angeles, California, at the office of the architect of said hotel structure at Oakland, California;

That as to whether the plaintiff in the first part of January, 1946, went to San Francisco and interviewed the Dohrmann Hotel Supply Company or instructed said Company to get out plans for new equipment, designs and prices for dining rooms, kitchens, bars and other matters appertaining to hotel equipment, defendants have no knowledge or information sufficient to form a belief; [40] deny that these defendants well or otherwise knew of plaintiff's alleged interview with said Dohrmann Hotel Supply Company, and except as above stated, the defendants deny the allegations of said Paragraph IX.

X.

Answering the allegations of Paragraph X of said Amended Complaint, the defendants deny that during the period or time from September 24, 1945, up to and including about the 10th day of April, 1946, the said defendants or any of them retained plaintiff's \$10,000.00 cash deposit, but admit that said cash deposit was retained from October 4, 1945, the date same was received by defendant Mrs. Chas. W. Mapes, until shortly after April 1, 1946, when the said defendant tendered the return of said \$10,000.00 to the plaintiff; deny that during the period of time from September 24, 1945, to about April 10, 1946, the defendants by word, or act or conduct led plaintiff to believe that they would proceed further or at all under said Exhibit A.

XI.

Answering the allegations of Paragraph XI of said Amended Complaint, the defendants deny that in further or any recognition of the alleged waiver by defendants of said time element and the alleged estoppel, the defendants caused to be published in local newspapers or trade journals, featured or prominent illustrated articles stating that plaintiff would conduct and operate said hotel.

XII.

Answering the allegations of Paragraph XII of said Amended Complaint, the defendants deny that the alleged lack of observance or performance of the time elements of said agreement referred to was the fault of the defendants or any of them; deny that at any time prior to on or about March 18, 1946, the plaintiff told defendants he was ready to sign a lease whenever they should prepare and submit it; admit that no form of lease was ever tendered plaintiff by the defendants or any of them; deny that defendants had superior knowledge as to when final plans for said hotel structure were completed; deny that defendants had superior knowledge as to when actual construction commenced; deny that no interview with plaintiff was sought by defendants for the final preparation of the lease; deny that said defendant are or that any of them is or were at fault or were neglectful or delinquent in not seeking or arranging such an interview or conference with plaintiff within the periods of time set forth in said Exhibit A.

XIII.

Answering the allegations of Paragraph XIII of said Amended Complaint, the defendants deny that all the material or essential provisions of the proposed lease were or are expressly stated and set forth in said Exhibit A; deny that said Exhibit A contains all material or essential provisions, and deny that the parties agreed to that effect; deny that all other matters and things usually contained in similar leases would be merely incidental or in accordance with custom and usage, and deny that there exists any applicable custom or usage.

XIV.

Answering the allegations of Paragraph XIV of said Amended Complain, the defendants deny that notwithstanding the alleged continued acts, conduct or representations of defendants as therein alleged, the defendants personally or through their attorney on or about April 10, 1946, either with or without cause or reason, repudiated the said Exhibit A alleged agreement; deny [42] that said alleged agreement contained any binding lease obligations; deny that at any time after the expiration of ten days from January 25, 1946, date when actual construction of hotel building commenced, said Exhibit A was of any legal or binding force whatever; deny that no cause or reason was given plaintiff for defendants' refusal to proceed further with said Exhibit A.

XV.

Answering the allegations of Paragraph XV of said Amended Complaint, the defendants deny that plaintiff has fully or faithfully performed all or any acts or things, covenants or conditions in said agreement required of him to be performed; deny that plaintiff has always been ready, or willing, or able, or is now ready, or willing, or able, to enter into or execute said lease as in said Exhibit A provided; deny that plaintiff always has been or is ready, willing or able to comply with all or any of the terms, covenants, agreements or conditions of said Exhibit A.

XVI.

Answering the allegations of Paragraph XVI of said Amended Complaint, the defendants deny that it was at the special instance or request of the defendant Irene Gladys Mapes that her son Charles W. Mapes, Jr., was associated with plaintiff as a second party to said alleged agreement Exhibit A; as to whether plaintiff reposed sufficient or any faith or confidence in the said Charles W. Mapes, Jr., to believe that he would faithfully or otherwise carry out his obligations under said Exhibit A, or that he would join with plaintiff in demanding and executing the lease as in said alleged agreement provided, the defendants are without knowledge or information sufficient to form a belief; deny that the said [43] defendant Charles W. Mapes, Jr., has wrongfully, unjustly or inequitably, or in fraud of plaintiff's rights, or otherwise, or at all, conspired

or confederated with his co-defendants, or either of them, in repudiation of said alleged agreement; deny that plaintiff has always or at all been ready, willing or able, or is now ready, willing or able personally to assume, pay or perform in full all obligations, acts or things required to be performed by the defendant Charles W. Mapes, Jr., under said alleged agreement or lease; deny that said plaintiff is willing or able to take or execute said lease in his own name.

XVII.

Answering the allegations of Paragraph XVII of said Amended Complaint, the defendants deny the same.

XVIII.

Answering the allegations of Paragraph XVIII of said Amended Complaint, the defendants deny the same.

For a further answer and first defense, the defendants allege and show:

I.

That on November 6, 1945, the defendant Mrs. Chas. W. Mapes, as grantor, executed and delivered a grant, bargain and sale deed of conveyance to defendants Charles W. Mapes, Jr., and Gloria Mapes as grantees, conveying to each of said grantees an undivided one-third interest in the property commonly known as the old Post Office Site situate on the southeast corner of First and Virginia streets,

Reno, Nevada; that said Gloria Mapes paid for her undivided [44] one-third interest in said property so conveyed to her the sum of \$50,041.67; that said purchase was made as aforesaid in good faith by said defendant Gloria Mapes and said purchase price was paid without any knowledge or notice on the part of the said defendant Gloria Mapes of the existence of the alleged agreement dated September 24, 1945, a copy of which is annexed to plaintiff's Complaint herein and marked Exhibit A; that the said defendant Gloria Mapes had no knowledge or notice of the existence of the said Exhibit A document and transaction therein mentioned until long after November 6, 1945, the date of the purchase of said one-third interest by her as aforesaid.

For a further answer and second defense, the defendants allege and show:

I.

That as provided for in said Exhibit A, plans and specifications were to be prepared and then approved in writing by the plaintiff and by the defendants Irene Gladys Mapes and Charles W. Mapes, Jr., before any lease on said premises should become effective, and that within 10 days after the actual construction of said hotel building had been commenced, a written lease for all of said structure when completed, with the exceptions in said Exhibit A mentioned, should be entered into provided that the terms, conditions and details of said lease could be mutually agreed upon between the parties

to said Exhibit A; that the defendants Mrs. Chas. W. Mapes and Charles W. Mapes, Jr., at all times since September 24, 1945, and particularly at the time of commencement of construction of said hotel building and for 10 days and [45] more thereafter, were in Reno where for many years they have resided; that defendants repeatedly requested said plaintiff to meet with them and conclude the lease transaction; that said plaintiff did not reside in Reno and only made occasional and short visits and for the period of 10 days and more, to-wit: for several months, more or less, said plaintiff was not in Reno or in any event did not personally contact the defendants, as a result of which the details of said proposed lease were not discussed by the parties as provided for in said Exhibit A, or at all.

For a further answer and third defense, the defendants allege and show:

I.

That as appears therefrom, said Exhibit A was intended by the parties thereto to be merely a preliminary memorandum of some of the basic things to be incorporated in the lease if and when details of same were agreed upon, and that said lease should contain all necessary provisions to fully effectuate the intention and purpose of said preliminary agreement, and also to definitely set forth all usual and necessary conditions to the end that the rights and interests of each party should be conserved and protected, and defendants here aver

and specify, as some of the necessary conditions for the protection of the rights of the parties, the following:

1. Non-assignability of the lease by lessees, or by either of them, without the written consent of the lessor.

2. Interest of the lessees not to be transferable or pass in case of death, bankruptcy, receivership or pass by operation of law in any manner. [46]

3. Inasmuch as lease rentals are upon a percentage basis of gross proceeds of lessees' business, the lease should require lessees to keep true books of account and give lessor right of free inspection and audit.

4. A clause clarifying and particularizing Paragraph 9 of Exhibit A as to what amount proposed lease should require for taxes; what amount for upkeep on the building; what amount for insurance on the building; what amount of "borrowed money," and what rate of interest should be applied; what amount payable annually for amortization of cost of building.

5. A clause clarifying Paragraph 4 of Exhibit A as to what should constitute suitable, proper and necessary fixtures and equipment, and whom, if anyone, shall have power of determining in case the parties are unable to agree.

6. Clause clarifying Paragraph 5 of Exhibit A in respect of either including or excluding the

garage and if excluded and lessor leases same to some third person, upon what terms and charges the lessees should have privilege of garage service for their guests.

7. Clause clarifying Paragraphs 7, 8 and 9 of said Exhibit A as to the terms of the chattel mortgage to be given as security for the rental payments, and how condition same as security for the rental payments provided for by the percentage clause of Exhibit A, and how condition same as security for the guaranteed minimum provided for by Paragraph 9 covering taxes, upkeep, insurance, interest on borrowed money and amortization—the amount of at least some of the items being impossible to ascertain in advance of the time said proposed lease was to be made. [47]

8. Consequences of lessees' noncompliance with the terms of the lease, whether giving lessor right to terminate with or without notice, and if the former, what kind of notice.

9. Lessees to comply with all laws of the state and with local ordinances, statutes and regulations.

10. Lessees to indemnify lessor against damage to lessor or other tenants, resulting from overflow or breakage of water or sewer pipes or damage from leakage.

11. Lessor not to be liable for damages caused lessees by reason of any acts of other tenants of the building.

12. Lessees' failure to promptly pay charges of

public utilities as to leased part of the building and consequence of such failure as constituting default.

13. Lessees to keep leased premises in repair and whether or not additions or improvements made by lessees are to remain on the property at the end of the term.

14. Lessees to allow the usual "For Rent" signs to be posted by lessor for some period next prior to termination of the lease.

For a further answer and fourth defense, the defendants allege and show:

I.

(a) That on September 24, 1945, it was contemplated and intended by all parties to said Exhibit A that plans of the proposed hotel structure, together with specifications for same, prepared by the Moorehead Company should be annexed to said Exhibit A [48] and be approved in writing by the parties thereto within the time limited; that no copy of any plans or of specifications were ever annexed to said Exhibit A and approved in writing by the parties; that on or about November 26th; again on or about December 12th and December 27, 1945; and on or about January 25th and March 9, 1946, the defendant Mrs. Chas. W. Mapes requested plaintiff to meet with said defendant and defendant Charles W. Mapes, Jr., for considering and approving such plans and specifications and of discussing terms of the proposed lease; that said hotel structure was to plaintiff's knowledge commenced on or

about January 25, 1946; that said plaintiff neglected, failed and refused to meet with said defendants;

(b) That the \$20,000.00 cash required by Paragraph 1 of said Exhibit A to be deposited by said Charles W. Mapes, Jr., and plaintiff P. G. Denson as a guarantee of their good faith, was not deposited contemporaneously with the making of said Exhibit A, or at all, except that \$10,000.00 was deposited on or about October 4, 1945, but the remaining \$10,000.00 has never been deposited or tendered to said defendant Mrs. Chas. W. Mapes.

(c) That about six years prior to September 24, 1945, said plaintiff proposed to defendant Mrs. Chas. W. Mapes that she construct an hotel on said lot referred to in Exhibit A and then lease said hotel to him, the said plaintiff, which proposal was promptly rejected by said Mrs. Chas. W. Mapes on the ground as then stated to said plaintiff that said lot had been acquired for the purpose of erecting thereon an hotel building to be leased exclusively to her son, the said Charles W. Mapes, Jr., together with such associates, if any, as he might consider; that shortly prior to said September 24, 1945, said plaintiff renewed said subject by urging said defendant Mrs. Chas. W. Mapes that he, the plaintiff, be considered in a lease that was to be granted to the said Charles W. Mapes, Jr., on said hotel, the plaintiff representing [49] himself to be an experienced and capable hotel man and able to guide defendant's said son in such a venture; that said

lease was to be given to said Charles W. Mapes, Jr., who, because of the said alleged experience and ability of said plaintiff, would consider the plaintiff being associated with him as a co-lessee; that said plaintiff insistently urged the foregoing upon said defendant Mrs. Chas. W. Mapes; that said Charles W. Mapes, Jr., was at the time in the Armed Forces and was unable to attend upon all conferences; that the proposed association was discussed between said Charles W. Mapes, Jr., and plaintiff upon the basis of 30% of net earnings to plaintiff and 70% to said Charles W. Mapes, Jr.; that said plaintiff was insistently urging said defendant Mrs. Chas. W. Mapes to sign some sort of a memo of some of the items to go into the proposed lease as he wanted to have such writing to "show"; whereupon plaintiff submitted a typewritten form of preliminary memo to the said defendant and, after consideration and agreeing in the main thereto, the plaintiff, Charles W. Mapes, Jr., and Mrs. Chas. W. Mapes then repaired to the office of said defendants' attorney and the latter, after discussing several changes, re-drafted said preliminary agreement and the same was later signed by the parties thereto; that said defendant Mrs. Chas. W. Mapes believed and relied upon the said representations of said plaintiff and would not otherwise have considered granting a lease where plaintiff was to have an interest; that on or about April 1, 1946, the plaintiff and defendant Charles W. Mapes, Jr., had a meeting regarding terms of the proposed leasing association whereat being unable to agree, the said

Charles W. Mapes, Jr., informed the plaintiff he would not proceed further with the proposed venture; whereupon plaintiff stated in effect that he held a contract for a lease and would compel recognition of himself alone, [50] if necessary, as the lessee and manager; that said defendant Charles W. Mapes, Jr., in an endeavor to reach an agreement as to said lease, as well as to the association of plaintiff in the conduct of said hotel, invited plaintiff to come to Reno for a conference; that plaintiff came to Reno on or about April 10, 1946, and a conference was held, but said plaintiff repeated his claim to having a contract for a lease which he could and would enforce and the conference abruptly terminated; that thereupon said Charles W. Mapes, Jr., advised the defendant Mrs. Chas. W. Mapes of the foregoing and that he would not sign any lease with the plaintiff as co-lessee; that plaintiff had previous notice to that effect; whereupon said defendant Mrs. Chas. W. Mapes notified said plaintiff she would return the \$10,000.00 deposited as aforesaid; that the defendant Charles W. Mapes, Jr., agreed to said proposal for the return of said \$10,000.00 and tender of same was made promptly after said April 10, 1946; that said plaintiff refused and continues to refuse to accept or permit a return of said \$10,000.00 and insists upon the right asserted by him to secure a 20-year lease upon said hotel structure to himself and said Charles W. Mapes, Jr., as co-lessee, or to himself alone, if the said Charles W. Mapes, Jr., refuses to join as a co-lessee.

For a further answer and fifth defense, the defendants allege:

I.

That substantially, the only reason, as plaintiff well knew, for defendant Mrs. Chas. W. Mapes signing said Exhibit A was as stated in subsection (c) of the fourth defense, here referred [51] to and made a part hereof; that at all times subsequent to September 24, 1945, and prior to April 10, 1946, said defendants were willing, irrespective of said Exhibit A, to meet with and endeavor to agree upon the terms of a 20-year lease to said Charles W. Mapes, Jr., and the plaintiff, and said Charles W. Mapes, Jr., was likewise willing to meet with plaintiff and endeavor to agree upon the terms on which they would operate said hotel; that on or about April 10, 1946, said Charles W. Mapes, Jr., had a further conference with plaintiff in Reno in an endeavor to agree relative to their proposed hotel operation, at which plaintiff, among other things, insisted upon a wholly unfair sharing of proceeds and of management; that plaintiff, among other things, asserted that he had a contract (referring to Exhibit A) binding upon defendant Mrs. Chas. W. Mapes, which he proposed to enforce regardless of whether said Charles W. Mapes, Jr., joined as a co-party; that defendant Charles W. Mapes, Jr., then notified plaintiff that because of the latter's said unfair and unacceptable demands, he, the said Mapes, Jr., would proceed no further regarding the subject matter of said Exhibit A and would not

sign any lease or agreement whatsoever with plaintiff as a co-party; that said Charles W. Mapes, Jr., thereupon notified defendant Mrs. Chas. W. Mapes that he would not sign the proposed or any lease with said plaintiff as co-lessee; that thereupon the defendant Mrs. Chas. W. Mapes, with the approval of said defendant Charles W. Mapes, Jr., notified plaintiff that she would return said \$10,000.00 and tender thereof was duly made shortly after said April 10, 1946, but plaintiff refused and continues to refuse to accept or permit a return of said \$10,000.00 and to insist upon a 20-year lease upon said hotel structure to himself and said Charles W. Mapes, Jr., or to himself alone if the said Charles W. Mapes, Jr., refuses to join as co-lessee. [52]

For a further answer and sixth defense, the defendants allege and show:

I.

That under the proposed rental terms mentioned in Paragraph 5 of said Exhibit A, the total guaranteed rental on a 20-year lease, to be paid to the owner of said hotel building, when completed, not including the 8 store spaces on Virginia street and 3 store spaces on First street, would, as nearly as defendants are able to state, approximate \$9000.00 per month;

That under the proposed guarantee of Paragraph 9 of said Exhibit A, the rental income from the entire building, the amount sufficient to cover payments required for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of

said building within said proposed 20-year lease period, would, as nearly as defendants are able to state, approximate \$10,000.00 per month;

That the fair and reasonable net rental for said premises under the same conditions as to time, not including the said 8 store spaces on Virginia street and 3 store spaces on First street, would be not less than \$25,000.00 per month, and inclusive of said store spaces, the fair and reasonable net rental would be not less than \$30,000.00 per month.

II.

That as defendants are informed and believe and so allege the fact to be, the cost of placing in said hotel structure such furniture, fixtures and equipment as should be suitable, proper and necessary to furnish and equip the same as a first class hotel and apartment building will be at least \$300,000.00, and not \$150,000.00 as mentioned in Paragraph 4 of said Exhibit A. [53]

Wherefore, defendants pray:

(a) That plaintiff take nothing by his Amended Complaint and action herein;

(b) That it be decreed that said Exhibit A is null and void and is not and never became a legal contract;

(c) That said plaintiff be ordered and decreed to deliver up said Exhibit A to the Clerk of this Court for complete cancellation thereof, and that said plaintiff be perpetually enjoined from making

or asserting any claim against said premises or against the defendants, or any of them, by reason of said Exhibit A;

(d) That defendants be awarded such further relief as the equities of the case may warrant and which to the court shall seem meet and proper.

H. R. COOKE,
JOHN D. FURRH, JR.,
Attorneys for Defendants.

Service, by copy, of the foregoing Answer to Amended Complaint admitted this 30th day of September, 1946.

PLATT & SINAI,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 1, 1946. [54]

[Title of District Court and Cause.]

Direct Interrogatories to be Propounded
S. P. BARASH

1. Q. Please state your full name and place of residence.
A. Sidney Phillip Barash, 2406 La Mesa Drive, Santa Monica, California.
2. Q. Are you acquainted with the plaintiff, P. G. Denson, and if so, how long have you known him? A. About fifteen years.
3. Q. Are you acquainted with Gladys Irene Mapes, also known as Mrs. Charles W.

Mapes, and Charles W. Mapes, Jr., and Gloria Mapes, or either or any of them?

A. I met Mrs. C. W. Mapes in 1940. I do not know the others.

4. Q. If your answer to the previous question is in the affirmative, state when and where you met them or any or either of them.

A. I met Mrs. Mapes early in 1920.

5. Q. Please state whether or not you discussed the construction and operation of a hotel on the Mapes property, known as the old post office site on Virginia Street, in Reno, Nevada, with Mrs. Mapes [55] some time during February or March, 1940?

A. Yes.

6. Q. If your answer to the previous question is in the affirmative, please state who was with you at the time you discussed the matter of the construction and operation of a hotel on the property aforesaid.

A. Mr. P. G. Denson, Mr. Douglas Stone and Mr. Leon Huckens.

7. Q. If you have already testified that you had a conversation or conversations with Mrs. Mapes, please testify what the conversation or conversations were, to the best of your recollection.

A. Mr. Denson had plans for a hotel to be erected on the old post office site and I was requested to advise all the parties con-

cerned regarding the possibility of securing a mortgage loan on the new development as well as the terms of such a loan.

8. Q. Please state why you went to Reno at that time and at whose request.

A. At Mr. Denson's request, see "7" for reasons.

9. Q. Please state whether or not Mr. P. G. Denson had any conversation or conversations with Mrs. Mapes regarding the construction, operation, and financing of said proposed hotel. A. Yes.

10. Q. If your answer to the previous question is in the affirmative, please state what said conversation or conversations consisted of, when and where they took place, and who was present.

A. The meeting took place at Mrs. Mapes' home. The parties present and the subject of the conversation is covered in "6" and "7".

11. Q. If negotiations were carried on in respect to the construction, operation, and financing of said proposed hotel, please state the conversations relating thereto, or, if you cannot remember the conversations, please state the substance of said conversations and particularly the conversations or substance of conversations relating to the possible leasing and operation of that hotel by P. G. Denson, if such was the case.

- A. Mr. Denson proposed to lease the hotel, on a percentage lease and the discussion was mostly about the size, number of rooms and estimated cost of the building.
12. Q. If negotiations continued for the construction, operation, and financing of said proposed hotel, please state how long said negotiations continued and the reason for the termination of said negotiations, if you know.
- A. This was the only meeting I attended.
13. Q. Please state how many times you came to Reno to discuss said proposed hotel with Mrs. Mapes and also state if you know how many times Mr. P. G. Denson called upon Mrs. Mapes and how many times Mr. Douglas Stone and Mr. L. W. Huckins called upon Mrs. Mapes in Reno, Nevada.
- A. I called only once. I have no way of knowing how many times the other parties went to Reno or met Mrs. Mapes.
14. Q. Please state of your own knowledge whether or not Douglas Stone, the architect, prepared any drawings, pictures, and plans for Mrs. Mapes some time about March, 1940.
- A. He had some sketches with him at this meeting described above.
15. Q. If the said Douglas Stone did prepare drawings, pictures, and plans, please state

if said drawings, pictures and plans were submitted to Mrs. Mapes for her approval.

A. Yes.

16. Q. Please state whether or not the name of the proposed hotel was designated on said drawings prepared by Douglas Stone and if so, what the name was.

A. I don't know.

17. Q. Please state how long you have known Mr. P. G. Denson, the plaintiff in this case.

A. About fifteen years.

18. Q. Have you ever had any business dealings with P. G. Denson in respect to hotels?

A. Yes.

19. Q. Please state your opinion of P. G. Denson as a successful hotel operator and give the basis for your answer.

A. Mr. Denson is a competent and capable hotel operator. He was successful in all his hotel operations.

20. Q. Do you consider the terms of a proposed lease as set out in Exhibit "A" attached to these direct interrogatories just, fair, and equitable to the Lessor and if so, state why?

A. Yes they are fair and are more generous than I would offer. I think 25% of room gross is ample and 3% of food gross is ample where tenant is supplying the equipment and furniture. The minimum guaran-

tee as covered by clause "9" in the agreement is larger than I would personally agree to.

21. Q. Please state whether or not you have been or are connected with the operation or management of a hotel or hotels.

A. Only as a consultant and expert.

22. Q. If your answer to the previous question is to the effect that you have been, or now are, an operator or connected with the management of a hotel or hotels, please give the names and locations of the hotel or hotels or periods of time you have been so engaged.

A. Have been consultant in hotel operations on the Pacific Coast for 30 years.

23. Q. Please state your experience, if any, as the lessee of a hotel or hotels, giving the names of said hotel or hotels, if any, and the period of time you acted as lessee.

A. Same as above.

/s/ S. P. BARASH. [57]

State of California,

City and County of San Francisco—ss.

On this 3rd day of December, in the year One Thousand Nine Hundred and Forty-six, before me, Margaret M. Lynch, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and

6. Q. Are you acquainted with the reputation of the plaintiff, P. G. Denson, as to his integrity and his capabilities as a hotel man and manager, and with his financial responsibilities?

A. In regard to Mr. Denson's reputation as a hotel man, will say that he is far above the average—very efficient and a practical business man, also knows how to meet the public, a good mixer with his guests and makes friends. Has the ability of selecting capable men for his assistants, pays top salaries and always has an excellent chef and serves the very best of foods.

Regarding his character—Mr. Denson has a very lovable disposition and is a man of fine character—prince of a fellow; born in Georgia, is a real Southerner, and I venture to say has more sincere friends than any other hotel man in California.

Mr. Denson's reputation is A-1 and as to his integrity, his word is as good as his bond.

His financial condition in 1940 was more than ample to furnish the hotel and now, in 1946, I know he is financially able to carry out all obligations in regard to his contract with Mrs. Mapes; in fact, he can furnish the entire hotel and in my judgment Reno is lucky in securing a man like Mr. Denson. Mr. Denson is capable and should have complete charge of all man-

agement; in other words, he is an excellent and efficient operator and if it could be arranged it would simplify matters to have only one manager.

7. Q. If your answer to the last question be in the affirmative, please state what his reputation in this respect is and upon what do you base it. Please answer with as much detail as possible.
- A. Question No. 7 has been fully answered in my answer to question No. 6—as stated above, I have known Mr. Denson for 18 years—so feel that I am qualified to state the above facts.

/s/ LEON HUCKINS.

The State of Texas,
County of Dallas—ss.

I, Margaret Joy Smith, a Notary Public in and for Dallas County, Texas, do hereby certify that the foregoing answers of Leon Huckins, the witness before named, were made, reduced to writing and read over to the witness in the due order of such interrogatories and cross-interrogatories, and were then signed and sworn to by the witness before me.

Given under my hand and seal of office this 5th day of December, A.D. 1946.

[Seal] /s/ MARGARET JOY SMITH,
Notary Public in and for
Dallas County, Texas.

[Endorsed]: Filed Dec. 13, 1946. [67]

words, we had 100 cent dollars for construction.

I managed the Sir Francis Drake from 1928 to 1938 (10 years) and in 1938 the Huckins interest sold out to the Hilton Hotel Co. [65]

3. Q. Are you acquainted with the plaintiff in the action, P. G. Denson, and if so, how long have you known him?

A. Yes, I am acquainted with Mr. P. G. Denson; have known him for about 18 years.

4. Q. State whether you visited in company with the plaintiff, P. G. Denson, Mrs. Irene Gladys Mapes of Reno, Nevada, one of the above named defendants, and if so, when, where and upon how many occasions?

A. Yes—in 1940 with Mr. Denson I made six or eight trips to Reno and discussed with Mrs. Mapes the building of a hotel on the old Post Office site.

Mr. Denson and I suggested plans for all floors and it is rather singular that our plans are practically the same as the present plans—that is, we located stores on the two streets—lobby in rear of stores and Coffee Shop adjacent to lobby near river.

We suggested having some apartments in addition to hotel rooms and the top floor for catering, gaming, etc.

We secured the services of Douglas Stone, a prominent S. F. architect. Mr. Stone drew several floor plans and exterior

elevations and we made two or three trips to Reno with Mr. Stone to discuss plans, etc., with Mrs. Mapes.

We also discussed with Mrs. Mapes the financing of the hotel. It was understood Denson and Huckins were to lease the entire building with the exception of the stores, also we were to furnish the hotel and give chattle mortgage on furniture to secure our lease.

Mrs. Mapes made one or two trips to S. F. to discuss project with us.

We were financially able to furnish hotel unincumbered and we also spent considerable time and money on the Reno project; all this was in the year 1940—the hotel was to be leased to Denson and Huckins, each owning 50% of corporation.

5. Q. Please state who were present at these visits or interviews, and what as nearly as you recall, with as much detail as possible, was said by any and all of them.
- A. Most of the question has been answered in question 4. Mrs. Mapes, Mr. Denson and I were present at all meetings, and Mr. Stone was present at two or three conferences.

Mrs. Mapes seemed quite anxious to lease hotel to us, but was not satisfied with Mr. Stone's plans—yet, her present architect is using practically the same layout of stores, public rooms, bedrooms, apartments and sky room, etc.

garage receipts, or, if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon.

6. That said lease shall provide that the second parties are to execute and deliver to the first party a first chattel mortgage covering the furniture, fixtures and equipment placed in the hotel and apartments as aforesaid, to secure the rental payments as provided in said lease.

7. That after said lease is executed between the parties hereto and if the second parties fail either to provide and place said furniture, fixtures and equipment in said hotel rooms and apartments as aforesaid, or if they fail to execute and deliver said chattel mortgage as such security as herein required, then the cash so deposited with the first party shall belong absolutely to the first party as a consideration for her entering into this agreement.

8. If after said lease is executed between the parties hereto as above provided, and the second parties provide and place said [60] furniture, fixtures and equipment in said hotel and apartments as aforesaid, and the second parties execute and deliver said chattel mortgage as security as herein required, then the cash so deposited with the first party shall belong to and be delivered to said second parties by the first party.

9. The second parties as a part of said lease, will guarantee to said first party that the total annual

income from the entire building which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period.

10. The said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected.

11. Time is of the essence of each and every term, covenant and agreement herein mentioned.

In Witness Whereof, the parties hereto have hereunto set their hands, the day and year first above written.

IRENE GLADYS MAPES.

Witnesses to the signature of First Party:

B. C. YPARRAGUIRRE,

H. R. COOKE.

CHARLES W. MAPES, JR.,

P. G. DENSON,

Second Parties.

Witnesses to the signature of Charles W. Mapes, Jr.:

H. R. COOKE.

Witnesses to the signature of P. G. Denson:

H. R. COOKE. [61]

Cross-Interrogatories to Be Propounded to S. P.
Barash, a Witness on the Part of Plaintiff

1. Q. If you answer Direct Interrogatory No. 20 in the affirmative, by stating that the proposed lease is just, fair and equitable to the lessor, what value did you assume for the lot or land upon which the hotel building is situate?

A. Mrs. Mapes stated in 1940 the land was worth \$300,000. The ground floor income would bear this out.

2. Q. What amount did you assume as the income from the eleven store spaces excepted from the lease arrangement?

A. Mrs. Mapes stated in 1940 the stores would readily rent for \$30 per front foot. If that was correct their present value would be about \$50.

3. Q. What amount did you assume as necessary to cover interest on borrowed money?

A. 4% on \$700,000.

4. Q. What rate of interest did you assume on such borrowed money?

A. 4% on \$700,000.

5. Q. What amount did you assume to cover cost of insurance?

A. \$3,000 to \$5,000 per year.

6. Q. What amount did you assume to cover cost of upkeep?

A. \$1000 per year.

7. Q. What amount did you assume for payment of taxes?

A. \$20,000 to \$25,000 for real estate taxes.

8. Q. What amount did you assume as the total annual income from the entire building which the lessor would receive?

A. \$241,500.

9. Q. How many hotels haave you operated in Nevada—state the names, locations, length of time, and capacity you were connected therewith? A. None.

10. Q. What figure did you assume in your answer to Direct Interrogatory No. 20 for allocation to the premises to be leased for hotel purposes and what amount did you allocate to the eleven store spaces which were excepted from the lease agreement?

A. The hotel food and liquor should
 bring in\$181,500
 The stores should bring in. 60,000

 \$241,500

11. Q. The attached statement mentioned in said Direct Interrogatory No. 20 provides that if the percentage of gross receipts shall not equal monthly \$2083.88, then the second parties (lessees) shall make up and pay to the first party the deficiency on any of the four [62] classifications mentioned in said statement. In your answer to said direct

interrogatory, which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion?

A. Neither. I don't think either minimum applies in view of the percentage rentals.

12. Q. If you answer Direct Interrogatory No. 20 to the effect that the proposed lease was just, fair, and equitable to the lessor, please state what figure you assumed as the size and capacity of the garage mentioned in paragraph 5 of the agreement?

A. Not considered.

13. Q. If you answer Direct Interrogatory No. 20 to the effect that rentals and other terms of the proposed lease are in your opinion just, fair and equitable to the lessor, please state what figure, terms, rental or other conditions you assumed the parties, plaintiff and defendants, should or would or ought to agree upon for the privilege of garage service for defendants' guests in case the garage was leased to a third person, as mentioned in paragraph 5 of said attached agreement?

A. Not considered as immaterial to total involved.

14. Q. What do you understand are the terms of the lease contemplated by the agreement referred to in Direct Interrogatory No. 20?

A. 20 year lease unfurnished based on 30% of

room gross, 10% of liquor gross, 5% of food gross.

15. Q. In answering Direct Interrogatory No. 20, do you understand that the terms of the lease contemplated by the agreement referred to in Direct Interrogatory No. 20 permitted the lessees to assign the lease or their interest therein without the consent of the lessor?

A. Not covered in agreement. Most leases have standard clauses on transfer which enable transfer to competent financially responsible hotel operator by owner's consent.

16. Q. In answering Direct Interrogatory No. 20, what did you assume the sky room in the proposed hotel was to be used for?

A. Food, liquor and dancing and other services of lawful nature.

17. Q. What figure did you assume in making said answer, as to the probable gross income from the operation of the sky room?

A. Not separated from total income as a separate operation.

18. Q. What figure did you assume as the net income from the sky room operations?

A. I am not trying to figure net income. The proposed lease was [63] based on gross income figures which were estimated by me.

/s/ S. P. BARASH.

State of California,
City and County of San Francisco—ss.

On this 3rd day of December, in the year One Thousand Nine Hundred and Forty-six, before me, Margaret M. Lynch, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared S. P. Barash, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] MARGARET M. LYNCH,

Notary Public in and for the City and County of
San Francisco, State of California.

[General]

My commission expires February 10, 1948.

[Endorsed]: Filed Dec. 13, 1946. [64]

[Title of District Court and Cause.]

Direct Interrogations to be propounded

LEON HUCKINS

A witness on behalf of Plaintiff.

1. Q. Please state your full name, present address and occupation or profession.

A. Leon Wood Huckins, Dallas, Texas, 4726 Coles Manor Place; retired from business.

2. Q. Have you ever been engaged in the hotel business, and if so, in what capacity. Please answer fully.

A. Yes—the four Huckins brothers have been in the hotel business all their lives and at one time owned or operated twelve hotels. Personally, I have managed the following hotels:

Huckins Hotel, Sedalia, Missouri.

Caddo Hotel, Shreveport, Louisiana.

Huckins Hotel, Oklahoma City, Oklahoma.

Westbrook Hotel, Fort Worth, Texas.

Sir Francis Drake Hotel, San Francisco, California.

I might add I purchased the property at the corner of Sutter and Powell Streets in S. F. in 1927, selected the architect and let building contract with Lindgren and Swinerton, who built the Sir Francis Drake, costing between 3 and 4 million dollars.

The above hotel was financed without any expense to the corporation. In other

other valuable and sufficient consideration present and received, the receipt whereof is hereby mutually acknowledged by the parties, that contemporaneously with the execution and delivery hereof, the second parties shall deposit with first party the sum of \$20,000.00 in cash as a guarantee of their good faith and by way of inducement for the first party to enter into this agreement.

2. That the first party agrees to complete said structure at said location subsequently, according to said completed and approved plans, and specifications to be prepared and approved, on or before January 1, 1947.

3. The parties hereto shall immediately enter into a discussion with each other as to the terms, conditions and details of said lease; that the period of said lease shall be not less than twenty (20) years from the date the premises are in condition for possession thereof to be delivered. The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease with each other for all of said structure when completed, with the exceptions above noted; provided, that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after the written contract for the construction of said structure has been entered into by the first party and within 10 days after the actual construction has been commenced.

4. That said lease shall provide, among other

things, that as soon as the hotel, rooms and apartments in said structure are ready for occupancy by the second parties, the second parties will at their own cost, now estimated at \$150,000.00, provide and place in said structure such furniture, fixtures and equipment as shall be suitable, proper and necessary to furnish and equip the same as a first class hotel and apartment building. [59]

5. That the rental for said structure when completed, with the exceptions noted above, shall be as follows:

- 5% of gross receipts from food sales
- 10% of gross receipts from liquors, wines and beer sales.
- 30% of gross receipts from hotel, rooms and apartments.
- All rentals payable monthly.

Provided, that in the event the said percentage of gross receipts shall not equal monthly:

For coffee shop, dining room	
and kitchen	\$ 600.00
For lounge	1000.00
For Skyroom	333.33
For mezzanine floor banquet room	150.00

then in such case, the second parties shall make up and pay to first party the deficiency on any of said four classifications so failing.

If the lease is to include the garage, then the second parties shall pay monthly 10% of the gross

sworn, personally appeared S. P. Barash, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] MARGARET M. LYNCH,

Notary Public in and for the City and County of
San Francisco, State of California.

[General]

My commission expires February 10, 1948.

EXHIBIT A

Agreement

This Agreement entered into this 24th day of September, 1946, by and between Irene Gladys Mapes, also known as Mrs. Chas. W. Mapes, of Reno, Nevada, hereinafter designated "first party," and Charles W. Mapes, Jr., of the same place, and P. G. Denson, of Visalia, California, hereinafter designated "second parties";

Witnesseth:

That Whereas, the first party intends to construct a new fireproof hotel, apartment, store building and garage, the total expense of which is now estimated

at \$800,000.00, or thereabouts, at the Southeast corner of Virginia and First Streets in the City of Reno, Nevada, having a frontage on Virginia Street of 167.64 feet and a frontage on First Street of 139.55 feet, in accordance with plans, a copy of which are annexed hereto, and specifications which are to be prepared by The Moorehead Company of Los Angeles, California, and which plans and specifications must be approved in writing by the parties hereto before any lease on said premises shall become effective; and

Whereas, inclusion of 12 feet of said frontage on Virginia Street, extending 139.55 feet easterly from Virginia Street is conditioned upon the first party consummating the purchase thereof from the City of Reno, negotiations therefor with the said City being now in progress; and

Whereas, it is contemplated the first party shall grant a lease to the second parties and the second parties shall receive a lease from the first party of all of said structure when completed, except eight (8) store spaces on Virginia Street and three (3) store spaces on First Street, on the first floor of said structure, as shown by the preliminary plans dated August 31, 1945, made by the said Moorehead Company, a copy whereof is annexed hereto and made a part hereof.

Now Therefore, This Agreement Further Witnesseth: [58]

1. That in consideration of the premises and for

[Title of District Court and Cause.]

Direct Interrogations to be Propounded

THOMAS E. HULL

1. Q. Please state your full name and place of residence.
A. Thomas E. Hull, 7000 Hollywood Blvd., Hollywood, California.
2. Q. Do you at the present time own any hotels in the State of California, and if so, please state their names and locations?
A. Hollywood Roosevelt; El Rancho, Sacramento, Calif.; Mirmar Hotel, Santa Monica; Arrowhead Springs Hotel.
3. Q. Have you ever formerly owned any hotels in the State of California, and if so please state their names and locations.
A. Same as above.
4. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake Hotel, San Francisco, California, and if so, how long have you known him?
A. Twenty-five years.
5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.
A. Owning and operating several hotels of prominence over the past 25 years.
6. Q. Do you know the reputation of Mr. Peter

G. Denson, the [68] plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

A. Excellent.

7. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

A. By the financial success he has achieved and by the reputation for his ability that he has in the hotel fraternity and with people such as bankers, attorneys, who have had connections and knowledge of his operations over the past 25 years.

8. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and prac-

tices of hotel operations on the Pacific Coast.

- A. I, personally, originated the first percentage lease on a hotel property in California, the same being at the Mayfair Hotel, Los Angeles, California. This lease was automatic in percentages—as per the terms as recited in the following brief.

The Mayfair lease by 15 years' experience has proven successful and fair to all parties concerned, and has been used by hotel accounting houses as a yardstick and considered workable, practical and a fair basis of computing the terms of rental percentage basis. I personally think the terms of rental as recited in the brief is extremely fair to the lessor. The percentages as outlined under the terms of rental in the lease brief attached can be applied to the gross receipts as estimated herewith, thereby leaving net returns to the lessor of sufficient amount to amortize the invested capital over a 20-year period, plus taxes, insurance and interest on borrowed capital, etc. [69]

“That the rental for said structure when completed, with the exceptions noted above, shall be as follows:

5% of gross receipts from food sales.

10% of gross receipts from liquors, wines and beer sales.

30% of gross receipts from hotel, rooms and apartments.

All rentals payable monthly.

“Provided, that in the event the said percentage of gross receipts shall not equal monthly—

For coffee shop, dining room and

kitchen\$ 600.00

For lounge 1000.00

For skyroom 333.33

For mezzanine floor banquet room 150.00

then in such case, the second parties shall make up and pay to first party the deficiency on any of said four classifications so failing.

“If the lease is to include the garage, then the second parties shall pay monthly 10% of the gross garage receipts, or, if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon.

“That said lease shall provide that the second parties are to execute and deliver to the first party a first chattel mortgage covering the furniture, fixtures and equipment placed in the hotel and apartments as aforesaid, to secure the rental payments as provided in said lease.

“That after said lease is executed between the parties hereto and if the second parties fail either to provide and place said fur-

niture, fixtures and equipment in said hotel rooms and apartments as aforesaid, or if they fail to execute and deliver said chattel mortgage as such security as herein required, then the cash so deposited with the first party shall belong absolutely to the first party as a consideration for her entering into this agreement.

“If after said lease is executed between the parties hereto as above provided, and the second parties provide and place said furniture, fixtures and equipment in said hotel and apartments as aforesaid, and the second parties execute and deliver said chattel mortgage as security as herein required, then the cash so deposited with the first party shall belong to and be delivered to said second parties by the first party.

“The second parties, as a part of said lease, will guarantee to said first party that the total annual income from the entire building which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period.”

Cross-Interrogatories to be Propounded to Thomas
E. Hull, a Witness on the Part of Plaintiff

1. Q. How many hotels have you operated in Northwestern Nevada? State the names,

locations and length of time and capacity you were connected therewith.

A. I have not operated any hotels in N.W. Nevada, but I built and designed and managed the very successful Hotel El Rancho at Las Vegas, Nevada.

2. Q. If in answer to direct interrogatory No. 8 your conclusion is that the rental price and consideration for said lease is fair, equitable and just to lessor and is a fair, just and adequate amount to pay as rental for said hotel premises, please state what figure you assumed.

The ones as recited under the lease brief as attached hereto.

(a) the total annual income from the entire building to be which the lessor would receive?

A. My estimation is this hotel should gross from all departments and sub-rentals and stores approximately \$1,350,000 per year.

(b) to cover payment required to be paid by the lessor for taxes?

A. There should be ample revenue from this operation to pay taxes and all other taxes including amortization of invested capital over a period of 20 years.

(c) to cover upkeep?

A. Same as answer "b".

(d) to cover insurance?

A. Same as answer to "b".

(e) to cover interest on borrowed money?

A. Same as answer to "b".

(f) as the cost of the building and to amortize the cost of said building?

A. Same as answer "b".

(g) for allocation to the premises to leased for hotel purposes and what amount did you allocate to the 11 store spaces?

A. \$1,290,000 gross revenue from the hotel and all depts. plus \$60,000 from the stores computed annually.

3. Q. The attached statement mentioned in said direct interrogatory No. 8 provides that if the percentage of gross receipts shall not equal monthly \$2083.33 then the second parties (Lessees) shall make up and pay to the first party the deficiency on any of the four [71] classifications mentioned in said statement. In your answer to said direct interrogatory which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion?

A. In computing the estimated figure of \$1,-350,000 gross receipts per annum I arrived at the figure as follows: Rooms dept. gross \$288,000 per annum; beverage dept. \$180,-

000; food dept. \$200,000; shop and store rentals \$60,000; concessionaires \$22,000 commissions, etc.; gross gambling \$600,000 (house revenue).

/s/ THOMAS E. HULL.

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me December 2,
1946, at 1 p.m.

[Seal] /s/ GRACE V. SMITH,
Notary Public in and for said
County and State.

My commission expires April 7, 1947.

[Endorsed]: Filed Dec. 13, 1946. [72]

Direct Interrogations to be Propounded

DAN E. LONDON

1. Q. Please state your full name and place of residence.
A. Dan E. London, St. Francis Hotel, San Francisco, Calif.
2. Q. What is your occupation, profession or vocation?
A. General Manager, St. Francis Hotel.
3. Q. Have you ever had any hotel experience, and if so, in what capacity?
A. Manager Exeter Hotel, Seattle, two years. Opened Edmond Meany Hotel, Seattle, and

managed it two years. Associate manager, Multnomah Hotel, Portland, three years Manager Sir Francis Drake Hotel, San Francisco, 2½ years. General manager, St. Francis Hotel, nine years.

4. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake Hotel, San Francisco, California, and if so, how long have you known him?

A. I have known Peter G. Denson for a period of 14 years. Mr. Denson has had extensive hotel experience, having operated, since my acquaintance with him, the Medford Hotel, Medford, Oregon, from [73] 1933 to 1936; the Travelers Hotel, Dunsmuir, California, from 1930 to 1939, and the Johnson Hotel at Visalia, California, from 1937 to 1946.

5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

A. His experience has been extensive, as he managed the Medford Hotel, Medford, Oregon, 1933 to 1936; Travelers Hotel, Dunsmuir, Calif., 1930 to 1939; Johnson Hotel, Visalia, Calif., 1937 to 1946.

6. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

A. I do know his reputation.

7. Q. If your answer to the last question is in the affirmative please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

A. Mr. Denson is considered an exceptionally capable hotel operator and to my knowledge has always conducted successful operations which have been well regarded by the traveling hotel public. In my opinion, his ability to manage a hotel efficiently is unquestioned.

8. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

- A. In my opinion, from an examination of the attached statement of lessors, return from the hotel building, including subrentals from a number of stores, will be more than sufficient to take care of all major obligations and quite enough to amortize the loan over a period of twenty years, for which period I understand the lease is drawn. The percentage figures, which, of course, are the most important from the viewpoint of the owner, are very fair and are usual and comparable to percentage figures in other hotel leases. [74]

[Attached statement and agreement is identical with the one set out in Deposition of Thomas E. Hull, and appears on page 69.]

Cross-Interrogatories to be Propounded to Dan E. London, a Witness on the Part of the Plaintiff

1. Q. How many hotels have you operated in Nevada? State the names, locations and length of time and capacity you were connected therewith.

A. No.
2. Q. If in answer to direct interrogatory No. 8 your conclusion is that the rental price and consideration for said lease is fair, equitable and just to lessor and is a fair, just and adequate amount to pay as rental for said hotel premises, please state what figure you assumed:

(a) the total annual income from the entire building to be which the lessor would receive?

A. \$180,000 to \$190,000.

(b) to cover payment required to be made by the lessor for taxes?

A. Approximately \$20,000.00 for taxes and insurance.

(c) to cover upkeep?

(d) to cover insurance?

A. Answered in "b" above.

(e) to cover interest on borrowed money?

A. This is entirely based on the amount borrowed.

(f) as the cost of the building and to amortize the cost of said building?

A. Entirely depending on the amount borrowed.

(g) for allocation to the premises to be leased for hotel purposes and what amount did you allocate to the 11 store spaces?

A. I am not familiar with store frontage rentals there.

3. Q. The attached statement mentioned in said direct interrogatory No. 8 provides that if

the percentage of gross receipts shall not equal monthly \$2083.33 then the second parties (lessees) shall make up and pay to the first party the deficiency on any of the four classifications mentioned in said statement. In your answer to said direct interrogatory which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion.

A.

[Notary Seal]

Nov. 22nd, 1946. 9:25 a.m.

DAN E. LONDON.

State of California,
City and County of San Francisco—ss.

On this 22nd day of November in the year One Thousand Nine Hundred and Forty-six before me Emi Eggers Del Bono, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Dan E. London, known to me to be the person described in, whose name is subscribed to and who executed the within and annexed instrument and he acknowledge to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed by Official Seal, at my office in the

City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] EMI EGGERS DEL BONO,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 27, 1947.

I, Emi Eggers Del Bono, hereby certify that I am a duly commissioned Notary Public in and for the City and County of San Francisco, State of California; that my commission expires August 27, 1947; that the witness named in the foregoing deposition consisting of direct and cross interrogatories was duly sworn by me and that the foregoing testimony set forth in said deposition (direct and cross-interrogatories) is a true record of the testimony given by said witness.

In Witness Whereof, the undersigned Notary Public has executed this certificate and attached her official seal thereto.

[Seal] EMI EGGERS DEL BONO,
Notary Public in and for the City and County of
San Francisco, State of California. [77]

[Title of District Court and Cause.]

Direct Interrogatories to be Propounded

MISS RUTH MASON

a witness on behalf of the Plaintiff.

1. Q. Please state your full name and place of residence, together with your business and occupation?

A. Ruth Roberta Mason, 503 Commonwealth, Los Angeles 5, Calif., Interior Decorator and salesperson for Barker Bros., Hotel & Apt. House Div., 733 South Flower street, Los Angeles 14, California.

2. Q. Are you acquainted with the plaintiff, P. G. Denson, and if so, how long have you known him?

A. Yes, have known him since February, 1946.

3. Q. What was the nature of your employment, profession, vocation or occupation on or about the 1st day of April, 1946, and by whom, if at all, were you employed?

A. Interior decorating, designing, selling for for Barker Bros.

4. Q. Please state whether on or about the 1st day of April, 1946, you visited the City of Oakland, California, on a business mission?

A. Yes, I did go to Oakland on 1 April, 1946, on a business mission.

5. Q. If your answer to the last question is in the affirmative, please state whether you had a business appointment in Oakland, California, at what place, and at whose instance and request was the appointment made.

A. I had an appointment at the office of the Morehead Company, in the Henshaw Building, 14th street near Broadway, Oakland, made at the request and arrangement of

Mr. Peter Denson, to meet with Mr. Charles Mapes, Mr. Slocum and Mr. Morehead and Mr. Denson. [78]

6. Q. If your answer to the last question is in the affirmative, please state, as nearly as you recall, who were present at that appointment and business meeting.

A. Mr. Mapes, who drove us over from San Francisco, his uncle, Mr. Hart, Mr. Denson, Mr. Slocum and Mr. Morehead.

7. Q. Please state with as much detail as possible, as nearly as you recall, what was said and done by you and each and all of the parties present at that meeting.

A. At Mr. Denson's request, seconded by Mr. Mapes, I showed and explained my drawings and plans for the new hotel, working from the ground floor throughout to the room floors, and then to the Sky Room, or roof. There was much discussion and interest displayed, several modifications suggested on the original plans, some omissions and changes in the Kitchen layout. The conference took about three hours. At about 12:15 or so, Mr. Mapes asked us all to luncheon with him "to continue the conference later." We all, except Mr. Slocum who had an appointment out of town, went to lunch together and returned about 1:40 or so. Then Mr. Mapes and Mr. Morehead said they wouldn't go on with the dis-

cussion of the Roof, or Sky Room, as "they had other plans and would go into those with Mr. Denson." However, Mr. Mapes expressed his appreciation of the drawings, and kept a copy of the Coffee Shop and Kitchen layout. Mr. Mapes then drove Mr. Hart, Mr. Denson and me back to the Sir Francis Drake Hotel in San Francisco, and took the package of plans and drawings up to my room for me.

8. Q. When did the meeting convene and when did it adjourn?

A. Convened approximately 9:30 and adjourned approximately 12:15. Then reconvened at approximately 1:40 and adjourned within about ten minutes.

9. Q. State whether there was any further discussion after the adjournment of the meeting with any of the parties present and within the hearing of Charles W. Mapes, Jr., one of the defendants herein, and if so, where did the discussion take place, and to the best of your recollection what was said with respect to the business matters involved? A. See #7 herewith.

/s/ RUTH ROBERTA MASON.

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me this 2nd day
of December, 1946, at 9 a.m.

[Seal] /s/ GRACE V. SMITH,

Notary Public in and for said
County and State.

My Commission Expires April 7th, 1947. [79]

CERTIFICATE OF NOTARY

I, Emi Eggers Del Bono, hereby certify that I
am a duly commissioned Notary Public in and for
the City and County of San Francisco, State of Cali-
fornia; that my commission expires August 27, 1947;
that the witness named in the foregoing deposition
consisting of direct and cross-interrogatories was
duly sworn by me and that the foregoing testimony
set forth in said deposition (direct and cross-inter-
rogatories) is a true record of the testimony given
by said witness.

In Witness Whereof, the undersigned Notary
Public has executed this certificate and attached
her official seal thereto.

[Seal] /s/ EMI EGGERS DEL BONO,

Notary Public in and for the City and County of
San Francisco, State of California.

Mr. Commission Expires August 27, 1947.

[Endorsed]: Filed Dec. 13, 1946. [80]

[Title of District Court and Cause.]

Direct Interrogatories to be Propounded

DOUGLAS STONE

1. Q. Please state your full name and place of residence. A. Douglas Dacre Stone.
2. Q. What is your business and profession?
A. Architect.
3. Q. How long have you been engaged in said business and profession?
A. Since 1926.
4. Q. Have you had experience in the designing and constructing of hotels?
A. Yes. Gaylord Hotel, El Cortez Hotel, San Francisco; Claridge Hotel, Oakland; Sir Francis Drake Hotel, San Francisco (alterations); Empire Hotel, San Francisco.
5. Q. Are you acquainted with the plaintiff, P. G. Denson, and if so, how long have you known him?
A. Yes, I have known Mr. Denson for twelve years.
6. Q. Are you acquainted with Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, and Charles W. Mapes, Jr., and Gloria Mapes, or either or any of them?
A. I know Irene Gladys Mapes. I do not know Charles W. Mapes, Jr., or Gloria Mapes.
7. Q. If your answer to the previous question is in the affirmative, state when and where you

first met them or any or either of them?

A. I first met Irene Gladys Mapes in Reno, in 1940.

8. Q. Please state whether or not you discussed the construction and operation of a hotel on the Mapes property, known as the old postoffice site on Virginia Street, in Reno, Nevada, with Mrs. Mapes some time during February or March, 1940. A. Yes.

9. Q. If your answer to the previous question is in the affirmative, please state who was with you at the time you discussed the matter of the construction and operation of a hotel on the property aforesaid.

A. P. G. Denson, Plaintiff, Sid Barash, hotel broker, and Lee Huckins, hotel operator.

10. Q. If you have already testified that you had a conversation or conversations with Mrs. Mapes, please testify what the conversation or conversations were, to the best of your recollection.

A. The conversation was in effect that I might be employed as the architect for the construction of the hotel upon the site above referred to and Mr. Barash might be interested in financing, Mr. Huckins and Mr. Denson might be interested in the operation of the hotel as tenants in accord with the lease to be agreed to.

11. Q. Please state what conversation or conver-

sations you had with Mrs. Mapes relative to the construction and operation of said proposed hotel and the drawing of plans by you for said proposed hotel, giving the number of conversations and when and where they occurred, and the persons present.

A. I had three meetings with Mrs. Mapes including the first one above referred to. The second meeting was approximately several months later. At that meeting Mrs. Mapes and I were present and I think, Mr. Denson and Mr. Huckins. I had prepared preliminary plans and I explained the plans to those present. There was a third meeting which took place several months after the second meeting. Mrs. Mapes and I were the only ones present. I presented to her revisions of the previously submitted plans and these were discussed.

12. Q. Please state why you went to Reno at that time and at whose request.

A. I went to Reno on the foregoing occasions in the possible anticipation of being employed as architect for the construction of the hotel at the request of Mr. Denson and Mr. Huckins.

13. Q. Please state whether or not Mr. P. G. Denson had any conversation or conversations with Mrs. Mapes regarding the construction, operation, and financing of said proposed hotel.

- A. Yes. Mr. Denson on the first occasion, and possibly the second, if he were present in accord with my recollection, had conversations with Mrs. Mapes relative to leasing the hotel, construction thereof and financing of the project.
14. Q. If your answer to the previous question is in the affirmative, please state what said conversation or conversations consisted [82] of, when and where they took place, and who was present.
- A. The conversations with Mrs. Mapes and Mr. Denson were on the first two occasions above referred to, assuming that Mr. Denson was there on the second occasion which is my best recollection, and they consisted of discussions concerning leasing, construction and financing the hotel and Mr. Denson's experience as a hotelman.
15. Q. If negotiations were carried on in respect to the construction, operation, and financing of said proposed hotel, please state the conversations, please state the substance of said conversations and particularly the conversations or substance of conversations relating to the possible leasing and operation of that hotel by P. G. Denson, if such was the case.
- A. I cannot remember the details of the conversations but the subject matter is set forth in my previous answers.

16. Q. If negotiations continued for the construction, operation, and financing of said proposed hotel, please state how long said negotiations continued and the reason for the termination of said negotiations, if you know.
- A. My knowledge of negotiations and discussions is confined to the three meetings above referred to, and these three meetings were within a period of about six months from the first meeting. The first and second meetings were about two hours each and the third was about one hour. I do not know anything about termination of negotiations or the reason therefor.
17. Q. Please state how many times you came to Reno to discuss said proposed hotel with Mrs. Mapes. A. Three times.
18. Q. Please state whether or not you prepared any drawings, pictures, and plans for Mrs. Mapes and if so, state whether they were delivered to Mrs. Mapes by you.
- A. I prepared preliminary drawings for the hotel and revised preliminary drawings therefor and explained them to Mrs. Mapes. I did not leave them with her. They are in my office and still available, if desired.
19. Q. Please state, to the best of your ability, the conversation that took place with Mrs. Mapes at the time you submitted said draw-

ings, pictures, and plans to her, stating where they were submitted and who was present.

A. I can only remember the subject matter of the conversation and not details. The subject matter is set forth in my previous answers.

20. Q. Please state whether or not the name of the proposed hotel was designated on said drawings prepared by you and, if so, what that name was.

A. I do not remember any name being suggested although it could readily have been.

21. Q. Please state how long you have known Mr. P. G. Denson, the plaintiff in this case.

A. Twelve years. [83]

22. Q. Have you ever had any business dealings with P. G. Denson in respect to hotels as it relates to your profession?

A. Mr. Denson and Mr. Huckins employed me to design a motel to be constructed in Sacramento, California.

23. Q. Please state your experience as an architect and designer of hotels.

A. I have been an architect for over twenty years steadily engaged in that profession. During that period my employees gradually grew from none to the present number of about twenty-five. I have designed hotels, as set forth in my previous answers.

I have likewise designed and supervised construction of medical-dental buildings, general commercial buildings, homes (to a lesser degree), hospitals (privately owned and for the Government), and structures of every character.

24. Q. From your business dealings with Mr. P. G. Denson, please state whether or not, in your opinion, he is a man well qualified to pass upon the fitness of hotel plans from the standpoint of a practical hotel operator.

A. I consider Mr. Denson well qualified from his hotel experience of many years to pass upon the fitness of hotel plans from the standpoint of the operator. His experience well qualifies him for such.

25. Q. From your experience, resulting from your business dealings with Mr. P. G. Denson, state whether or not, in your opinion, the advice of Mr. P. G. Denson to an architect and builder of a hotel is valuable.

A. I consider from my experience with Mr. Denson that his advice to an architect and builder of hotels would be highly valuable as a result of his many years of hotel operation.

26. Q. If your answer to the previous question is in the affirmative, please state the reason therefor.

A. My reason for considering that Mr. Den-

son has these qualifications is his long, successful experience as a hotel operator in a number of hotels. My reason for realizing that his advice on hotel construction would be valuable is my experience with him in connection with such matters.

/s/ DOUGLAS DACRE STONE.

Cross-Interrogatories to Be Propounded to Douglas Stone, a Witness on the Part of Plaintiff

1. Q. Have you had any discussion with Irene Gladys Mapes or Charles W. Mapes, Jr., or Gloria Mapes, or any of them, in regard to the designing or construction of the Mapes Hotel in Reno since September 24, 1945; if so, give the time, place and persons present on each occasion?

A. I had no conversations with Mrs. Mapes since September 24, 1945.

/s/ DOUGLAS DACRE STONE.

[Endorsed]: Filed Dec. 13, 1946. [85]

[Title of District Court and Cause.]

Direct Interrogatories to be Propounded

MR. WILL P. TAYLOR

1. Q. Please state your full name and place of residence.
A. Will P. Taylor, San Francisco, California.
2. Q. What is your occupation, profession or vocation?
A. Hotel manager.

3. Q. Are you associated in any official capacity with the Bellevue Hotel, San Francisco, and if so, in what capacity and for how long a period of time?

A. Resident manager, Hotel Bellevue, since September 1, 1946.

4. Q. Have you ever acted in any official capacity of any other hotels in the State of California, and if so, please state their names and in what capacity you served, and for how long a period of time?

A. Manager of Palace Hotel, December, 1938, to April, 1940; manager, Santa Barbara Biltmore, May, 1940, to August, 1943; manager Hotel Senator, Sacramento, December, 1943, to May, 1946. [86]

5. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake hotel, San Francisco, California, and if so, how long have you known him?

A. Yes, I haave known Mr. Peter D. Denson approximately twenty years.

6. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

A. Yes, I can certify that I have known of his ownership and operation of Hotel Medford, Medford, Oregon, Hotels Senator

and Governor, San Francisco, Hotel Tioga, Merced, and Hotel Johnson.

My recollection is that Mr. Denson in the majority of cases mentioned, built, opened and operated the above hotels.

7. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

A. Yes, it is excellent.

8. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

A. It is my opinion Mr. Denson's qualifications, his ability, integrity and efficiency as an hotel operator are excellent, and he could be depended upon to achieve satisfactory results in every particular.

9. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to

the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

A. Yes, I would consider it more than equitable. [87]

[Attached statement and agreement is identical with the one set out in Deposition of Thomas E. Hull, as appears on page 71.]

Cross-Interrogatories to Be Propounded to William Taylor, a Witness on the Part of Plaintiff

1. Q. How many hotels have you operated in Nevada? State the names, locations and length of time and capacity you were connected therewith.

A. I have not been directly associated with any hotel in the State of Nevada—however, I have been indirectly connected by chain operation with El Rancho Vegas some time ago.

2. Q. If in answer to Direct Interrogatory No. 9 your conclusions is that the rental price and consideration for said lease is fair, equitable and just to lessor and is a fair, just and adequate amount to pay as rental for said hotel premises, please state what figure you assumed:

- (a) the total annual income from the entire building to be which the lessor would receive?

A.

- (b) to cover payment required to be paid by the lessor for taxes?

A.

- (c) to cover upkeep?

A.

- (d) to cover insurance?

A.

- (e) to cover interest on borrowed money?

A.

- (f) as the cost of the building and to amortize the cost of said building?

A.

- (g) for allocation to the premises to be leased for hotel purposes and what amount did you allocate to the 11 store spaces?

3. Q. The attached statement mentioned in said Direct Interrogatory No. 9 provides that if the percentage of gross receipts shall not equal monthly \$2083.33 then the second parties (lessees) shall make up and pay to the first party the deficiency on any of the four classifications mentioned in said

statement. In your answer to said direct interrogatory which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion?

- A. "A" to "E" both inclusive of Page 1 of Cross-interrogatory: I have made some estimates based on the results that could be conservatively obtained in the operation of an Hotel located in Reno, and, as equitable to the Lessor and to my knowledge goes beyond the usual lease in many cases I know of. The percentages should not be any higher, as the Lessee must be able to operate successfully in order to insure his guarantees to the Owner and meet his own obligations. The Lessee secures the Owner, I understand, through the execution of a chattel mortgage on the furnishings, which should prove ample security and result in a lease entirely fair to the Owner, in my opinion. An operator of ability and experience is an essential prerequisite to all of the above and I deem Mr. Peter Denson fully qualified, as previously mentioned. The combinations existing in this case, in my opinion, make a fair lease to the parties concerned. Naturally, there must be sufficient rooms to produce a given revenue and in my calculations I have based same on a total of

not less than 250 rooms, to be either straight hotel rooms and three room apartments, with the hotel rooms well in the majority.

/s/ WILL P. TAYLOR. [90]

State of California,

City and County of San Francisco—ss.

On this 22nd day of November in the year One Thousand Nine Hundred and Forty-six, before me, Emi Eggers Del Bono, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Will P. Taylor, known to me to be the person described in, whose name is subscribed to and who executed the within and annexed instrument and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal]

EMI EGGERS DEL BONO,
130 Montgomery Street,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 27, 1947.

CERTIFICATE OF NOTARY

I, Emi Eggers Del Bono, hereby certify that I

am a duly commissioned Notary Public in and for the City and County of San Francisco, State of California; that my commission expires August 27, 1947; that the witness named in the foregoing deposition consisting of direct and cross-interrogatories was duly sworn by me and that the foregoing testimony set forth in said deposition (direct and cross-interrogatories) is a true record of the testimony given by said witness.

In Witness Whereof, the undersigned Notary Public has executed this certificate and attached her official seal thereto.

[Seal] EMI EGGERS DEL BONO,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 13, 1946. [91]

[Title of District Court and Cause.]

Proposed Direct Interrogatories to be Propounded

MR. GEORGE T. THOMPSON

1. Q. Please state your full name and place of residence.

A. George T. Thompson.

2. Q. What is your occupation, profession or vocation?

A. Vice President and Managing Director,
Sir Francis Drake Hotel.

3. Q. Please state whether you have ever been

engaged in the hotel business, and if so, for how long a period of time.

A. 25 years.

4. Q. Is it not a fact that for some time last past you have been managing director of the Hotel Sir Francis Drake, San Francisco, California? A. 5 years.

5. Q. Do you own any hotels at the present time, and if so, what are they and where are they situated?

A. Sonoma Mission Inn, Boyes Springs, California; President Hotel, Palo Alto, California; Eureka Inn, Eureka, California.

6. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake Hotel, San Francisco, California, and if so, how long have you known him?

A. Yes. 15 years. [92]

7. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

A. I have known Mr. Denson as operator of hotels during the past 15 years and I am positive that all of these hotels were operated successfully and that he is considered a good hotel operator among the hotel fraternity.

8. Q. Do you know the reputation of Mr. Peter

G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

A. Mr. Denson has been actively engaged in the hotel business and also has been on the Board of Directors of the California State Hotel Association for a number of years. I consider him a man of ability and integrity and an efficient hotel operator.

9. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

A. Question 9 is answered by question 8.

10. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the

usual custom and practices of hotel operations on the Pacific Coast.

- A. The guaranteed rental on the hotel now under construction known as the Mapes Hotel is higher than the going rate at the present time. [93]

[Attached statement and agreement is identical with the one set out in Deposition of Thomas E. Hull, and appears on page 71.]

Cross-Interrogatories to Be Propounded to George T. Thompson, a Witness on the Part of Plaintiff

1. Q. How many hotels have you operated in Nevada? State the names, locations and length of time and capacity you were connected therewith.

A. I have not operated any hotels in the State of Nevada.

2. Q. If in answer to Direct Interrogatory No. 10 your conclusion is that the rental price and consideration for said lease is fair, equitable and just to lessor and is a fair, just and adequate amount to pay as rental for said hotel premises, please state what figure you assumed:

(a) the total annual income from the entire building to be which the lessor would receive?

- A. Based on prevailing hotel rates on an approximate 300 room hotel with anticipated

receipts from food and liquor, the lessor should receive, in my opinion, approximately \$175,000.00 per year.

(b) to cover payment required to be paid by the lessor for taxes?

A. \$20,000.00 a year covers the payments on upkeep, insurance and taxes.

(c) to cover upkeep?

A. Answered above.

(d) to cover insurance?

A. Answered above.

(e) to cover interest on borrowed money?

A. \$32,000.00, assuming the amount of the loan is \$800,000.00 to 4%.

(f) as the cost of the building and to amortize the cost of said building?

A. I estimate the amortization \$40,000.00 a year.

(g) for allocation to the premises to be leased for hotel purposes and what amount did you allocate to the 11 store spaces?

A. \$45,000.00.

3. Q. The attached statement mentioned in said Direct Interrogatory No. 10 provides that if the percentage of gross receipts shall not equal monthly \$2083.33 then the second

parties (lessees) shall make up and pay to the first party the deficiency on any of the four classifications mentioned in said statement. In your answer to said direct interrogatory which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion?

- A. My understanding is that the amount of \$2,083.33 per month was made up by the figures of \$600.00 from the Coffee Shop, kitchen and dining room, \$1,000.00 from the Cocktail Lounge, \$333.33 from the [95] Sky Room and \$150.00 from the Banquet Room.

/s/ GEORGE T. THOMPSON.

State of California,
City and County of San Francisco—ss.

On this 22nd day of November, in the year One Thousand Nine Hundred and Forty-six, before me, Emi Eggers Del Bono, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared George T. Thompson, known to me to be the person described in, whose name is subscribed to and who executed the within and annexed instrument and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in

the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] /s/ EMI EGGERS DEL BONO,

Notary Public in and for the City and County of
San Francisco, State of California.
130 Montgomery Street.

My commission expires August 27, 1947. [96]

CERTIFICATE OF NOTARY

I, Emi Eggers Del Bono, hereby certify that I am a duly commissioned Notary Public in and for the City and County of San Francisco,, State of California; that my commission expires August 27, 1947; that the witness named in the foregoing deposition consisting of direct and cross-interrogatories was duly sworn by me and that the foregoing testimony set forth in said deposition (direct and cross-interrogatories) is a true record of the testimony given by said witness.

In Witness Whereof, the undersigned Notary Public has executed this certificate and attached her official seal thereto.

[Seal] /s/ EMI EGGERS DEL BONO,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 13, 1946. [97]

[Title of District Court and Cause.]

Direct Interrogatories to be Propounded

HARVEY M. TOY

1. Q. Please state your full name and place of residence.
A. Harvey M. Toy. Hotel Manx, 225 Powell Street, San Francisco, California.
2. Q. Please state whether you own any hotel or hotels in the City of San Francisco, State of California, and if so, please state their names and locations.
A. Manx Hotel—300 rooms—225 Powell Street, San Francisco, California.
3. Q. How long have you been engaged in the hotel business in California, or otherwise. Please answer with as much detail as possible.
A. Forty years in hotel brokerage business, and approximately the same time in operation of hotels and ownership of hotels. All my business life has been connected in buying, operating and selling hotels.
4. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake Hotel, San Francisco, California, and if so, how long have you known him?
A. Yes. I have known him intimately for thirty (30) years.
5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and

character of that experience? Please answer with as much detail as possible.

A. Yes. I have visited all the many hotels Peter G. Denson has built—owned and operated. I sold him the Johnson Hotel, in Visalia, California, which I know he sold to go into the Reno Hotel. He [98] built and operated the Senator and Governor Hotels, in San Francisco. Also built and operated the Tioga Hotel, at Merced, California. He operated the Hotel Medford, Medford in Oregon, and the hotel Travellers in Duns-muir, California. There are several more hotels he operated which I cannot now remember. Therefore, he is a builder, lessee, operator and owner of wide experience—all of his ventures were successful.

6. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

A. Yes. I consider Mr. Peter G. Denson one of California's best and most outstanding hotel managers and operators. He is strictly honest—extremely efficient and economical. He stands very high in the opinion of all California hotel men.

7. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

- A. It is of the highest type. He has always been most successful and made money in all of his ventures. I would be willing to employ him at a splendid salary and percentage to operate my chain of hotels.
8. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee, or lessees, thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.
- A. In answer the question 8—the lessor's return from the entire building, which includes the rentals from the number of stores, which I understand are eleven in all—will be more than sufficient to take care of all her obligations such as taxes, insurance, interest on borrowed money, and amortize the loan over a period of the

twenty (20) years, which I am informed the lease is for. Due to the fact that the rentals on the stores in the heart of Reno, are very good, and with five per cent for foods, and ten per cent for beverages, and thirty per cent for all apartments and hotel rooms—gross rentals that is to be paid to lessors by lessee, and with a hotel with approximately three hundred rooms, and with the prevailing rentals in first class hotels, it will be more than sufficient to take care of all the obligations that the lessor would have to meet. As to the fairness to the owner of the property who is leasing the hotel, the above percentages are more than just and adequate in the amount to pay for any hotel. In fact the prevailing rate is now twenty-five (25%) per cent for rooms—five (5%) for food, and eight per cent (8%) for beverages. [99]

[Attached statement and agreement is identical with the one set out in Deposition of Thomas E. Hull, and appears on page 71.]

Cross-Interrogatories to Be Propounded to Harvey
M. Toy, a Witness on the Part of Plaintiff

1. Q. How many hotels have you operated in Nevada? State the names, locations and length of time and capacity you were connected therewith. A. None.
2. Q. If in answer to Direct Interrogatory No. 8

your conclusions is that the rental price and consideration for said lease is fair, equitable and just to lessor and is a fair, just and adequate amount to pay as rental for said hotel premises, please state what figure you assumed:

(a) the total annual income from the entire building to be which the lessor would receive?

A. Approximately \$180,000.00—to \$185,000.00 yearly—for the lessor—from entire building—stores and all.

(b) to cover payment required to be paid by the lessor for taxes?

A. As to question b-c- and d- \$20,000.00 a year would be my estimate to cover these three.

(c) to cover upkeep?

A.

(d) to cover insurance?

A.

(e) to cover interest on borrowed money?

A. Four per cent (4%) on borrowed money my understanding is they are trying to borrow \$650,000.00 or \$625,000.00—even \$800,000.00—\$72,000.00 would cover interest and ammortization over twenty (20) years.

(f) as the cost of the building and to amortize the cost of said building?

A. I was told this was to be amortized over a twenty (20) year period, and also that it

was not the cost of the building, but the amount of the borrowed money which was to be amortized over the 20 year period.

(g) for allocation to the premises to be leased for hotel purposes and what amount did you allocate to the 11 store spaces?

A. On basis of about 90 feet on Virginia Street at about \$30.00 per foot, and about 48 feet at \$25.00 a foot on First Street. This would be equivalent to approximately about \$45,000.00 a year for the stores alone.

3. Q. The attached statement mentioned in said Direct Interrogatory No. 8 provides that if the percentage of gross receipts shall not equal monthly \$2083.33 then the second parties (lessees) shall make up and pay to the first party the deficiency on any of the four classifications mentioned in said statement. In your answer to said direct [101] interrogatory which of the two minimum provisions mentioned in said statement did you use in reaching your conclusion?

A. The total amount of \$2,083.33 per month was made up from taking \$600.00 for the Coffee Shop, Dining room and kitchen—\$1,000.00 a month for the Cocktail Lounge on the first floor—\$333.33 for the Sky Room and \$150.00 for the banquet room on the mezzanine floor.

These are the percentages as shown on

the statement attached—page four of the document, but as the five per cent gross on food and ten per cent on beverages, and \$333.33 for the Sky Room and also the \$150.00 for the mezzanine banquet room, which of course are monthly guarantees, your gross business would have to be sufficient to take care of that fixed amount of the \$2083.33, which is mentioned in question three on the last page.

/s/ HARVEY M. TOY.

State of California,

City and County of San Francisco—ss.

On this 22nd day of November, in the year One Thousand Nine Hundred and Forty-six before me, Emi Eggers Del Bono, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Harvey M. Toy, known to me to be the person described in, whose name is subscribed to and who executed the within and annexed instrument and he acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] EMI EGGERS DEL BONO,
Notary Public in and for the City and County of
San Francisco, State of California, 130 Montgomery Street.

My Commission Expires August 27, 1947. [102]

CERTIFICATE OF NOTARY

I, Emi Eggers Del Bono, hereby certify that I am a duly commissioned Notary Public in and for the City and County of San Francisco, State of California; that my commission expires August 27, 1947; that the witness named in the foregoing deposition consisting of direct and cross-interrogatories was duly sworn by me and that the foregoing testimony set forth in said deposition (direct and cross-interrogatories) is a true record of the testimony given by said witness.

In Witness Whereof, the undersigned Notary Public, has executed this certificate and attached her official seal thereto.

[Seal] /s/ EMI EGGERS DEL BONO,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 13, 1946. [103]

In the District Court of the United States, in and for
the District of Nevada

No. 552

P. G. DENSON,

Plaintiff,

vs.

IRENE GLADYS MAPES, also known as MRS.
CHARLES W. MAPES, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY, a co-partnership,
Defendants.

Before: Hon. Roger T. Foley, Judge.

TRANSCRIPT OF TESTIMONY

TRIAL

Be It Remembered, That the above-entitled matter came on regularly for trial before the Court without a jury, at Reno, Nevada, on Monday, October 28, 1946, Hon. Roger T. Foley, Judge, presiding.

Appearances:

Platt & Sinai, by Samuel Platt, Esq., and John S. Sinai, Esq., Attorneys for Plaintiff.

H. R. Cooke, Esq., and John D. Furrh, Jr., Esq. Attorneys for Defendants.

The following proceedings were had: [109]

The Court: The case of Denson vs. Mapes.

Mr. Sinai: All ready for the plaintiff, your Honor.

Mr. Cooke: Ready for the defendants.

The Court: I would appreciate a statement as shown by the pleadings before we enter upon the taking of testimony.

Opening Statement by Mr. Platt

Mr. Platt: If the Court please, this is a suit in equity for the specific performance of a contract for leasing of hotel premises within the City of Reno, County of Washoe, State of Nevada. The amended complaint alleges the usual grounds for jurisdiction of this court, based upon the diversity of State citizenship and the statutory amount involved, exclusive of costs and interest. The amended complaint was filed because of an affidavit submitted by two of the defendants, Mrs. Mapes and Gloria Mapes, in which it was alleged that an interest in the hotel premises had been conveyed by the defendant, Mrs. Mapes, to the defendant, Gloria Mapes. The court, upon our motion, permitted the filing of the amended complaint so as to bring in Gloria Mapes as a party defendant.

Paragraph III of the amended complaint alleges that Mrs. Charles W. Mapes, at the time of the entering into of this agreement seized in fee of the hotel premises or lands involved.

Paragraph IV alleges that if there was a conveyance of any part or portion of the land and premises involved, it was made with knowledge upon the part of the defendant, Gloria [110] Mapes of the existence of said agreement.

Paragraph V alleges that the agreement was entered into on the 24th day of September, 1945, with respect to the leasing of the hotel part of the

building, excluding the so-called stores on the first floor. There is attached to the amended complaint a copy of the agreement. The same paragraph goes on to recite that said agreement is certain, definite, just, reasonable and mutual in its obligations and in all its parts. Then the amended complaint sets forth the rental price and consideration of the several parts and portions of the hotel premises to be occupied by the contemplated lease, and likewise provides that the tenant shall make up and pay any deficiency on any of the said four classifications so failing, the rental consideration being a certain percentage of the gross taken under these various departments in the performance of the lease. It further alleges that the period of the lease is set at not less than 20 years. It is also alleged that the rental shall be paid monthly. That time of payment is definitely expressed, and it is also alleged that it is stated in the written agreement itself and acknowledged that the agreement was entered into for a valuable and sufficient consideration present and received.

Paragraph VI of the amended complaint alleges that in accordance with one of the provisions or conditions of the agreement, the plaintiff deposited with the defendant, Irene [111] Gladys Mapes, the sum of ten thousand dollars and likewise alleges that at the request of the defendant, Irene Gladys Mapes, the plaintiff engaged an architect and contractor now constructing the hotel building upon said premises, that he conferred on many occasions with said architect and with the contractor em-

ployed on the work and with members of their staffs, with the defendants, and expended the necessary time and expense for attendance upon those conferences. Then it is alleged, if the Court please, that at the request of the defendant, Irene Gladys Mapes, the plaintiff secured a large and appreciable loan. I might interpolate here by stating that it was disclosed by one of the affidavits filed by the defendant, Mrs. Mapes, that she had secured the loan from other sources, and your Honor will find in the records a counter-affidavit executed by the plaintiff, in which affidavit he stated that he made every effort to secure the loan, negotiated with responsible financial parties, that they agreed to grant the loan, that he communicated that consent to Mrs. Mapes, but later learned that she had secured the loan from other sources, so in order that the amended complaint might comply with the facts as the plaintiff understands them, we ask the privilege of amending this paragraph of the amended complaint in conformity with the statement made in the counter-affidavit of the plaintiff.

The Court: Any objection to such an amendment, Mr. [112] Cooke?

Mr. Cooke: Yes, any alleged efforts and all that thing is stated in the affidavit and if he secured the loan, I think that the allegation should stand; if he did not, that anything he did or tried to do or didn't do is quite immaterial.

Mr. Platt: We think, your Honor, it is very material in order to show the efforts made by the plaintiff to cooperate with the requests and desires of the company.

Mr. Cooke: I submit, it is not efforts, it is what is done.

Mr. Platt: In fact we expect to establish, as a matter of equity, that the defendants leaned upon the plaintiff for many things involved in the erection of this note. We expect to show that it was at the request of the defendant, Mrs. Mapes, that Mr. Denson attempted to make the loan, in order to assist her, and he certainly exercised time and effort in order to accomplish it and would accomplished it unless she had negotiated the loan through other sources.

The Court: That amendment requested would be between lines 12 and 21 of paragraph VI?

Mr. Platt: It is the last paragraph in paragraph VI.

The Court: I would like to have it stated, that amendment.

Mr. Platt: I think I can dictate it: "Further the [113] said plaintiff, at the request of the defendant, Irene Gladys Mapes, attempted to secure a large and appreciable loan for the said defendants to finance the construction of the said hotel building, which the said defendant, Irene Gladys Mapes, informed the plaintiff she was unable to successfully negotiate through other channels. That said plaintiff entered into such negotiations with financially responsible persons and was assured by them and plaintiff in turn assured Mrs. Mapes, that he was able to secure the loan."

The Court—That is the requested amendment. That, if it was granted, of course, would be like any

other allegation in the complaint, subject at the time of the taking of testimony to any objection as to admissibility of evidence concerning the same.

Mr. Cooke: We would like the record to show also, your Honor, that we object to it as incompetent in any event as an allegation, on the ground that it is entirely outside of the written agreement, that it is not pursuant to the statute which requires agreements of this sort to be in writing, that it is an attempt to change a written contract into an oral contract on acts specifically performed, that the allegation of the efforts of the plaintiff as to attempts to do certain things that are not accomplished is irrelevant and immaterial as to performance. You have to show accomplishment.

The Court: I think all the objections raised in [114] that objection can be considered at the time testimony may be offered to prove these allegations. Permission will be granted to make the amendment and I suppose it can be done by adding a little rider to this paragraph or interlineation.

Mr. Platt: Well, in order to save time and I suppose not to unduly burden the record, I suggest a rider, your Honor, for a substitution.

The Court: If you will just prepare one and bring it in some time during the trial, we will attach it to the complaint. Now, is such an amendment going to embarrass the defendant or cause any change to make this amendment?

Mr. Cooke: No, sir, except we might want to change our answer after we see the written form of

rider that is going to be put on it. We want the privilege to amend our answer.

Mr. Platt: Certainly, we would have no objection. I might also add that the defendants have been duly advised, through the counter-affidavit promptly filed by Mr. Denson, the plaintiff, when he learned that she had negotiated a loan from other sources.

Then paragraph VII alleges that the plaintiff, in order to carry out the terms, conditions, and covenants of said agreement, by way of part performance thereof on his part, and all within the knowledge of said defendants, and each of them, this plaintiff obtained plans, specifications and prices from various firms on furnishings, equipment, accessories and supplies [115] to be installed in said hotel at the cost and expense of plaintiff and defendant, Chas. W. Mapes, Jr. Then we allege that as a further consideration for the agreement and relying upon the good faith of the defendants and with their knowledge, plaintiff sold at considerable financial sacrifice a hotel of which he was the sole owner and proprietor and we allege that good and valuable considerations in said agreement provided, are fair, just and equitable to said defendants and each of them.

Then in paragraph VIII we allege that the agreement was prepared by the attorney for the defendants and sent to the plaintiff by mail to Los Angeles, California, etc. In that connection, your Honor, I might state that we are not always in touch with the plaintiff because he lives in California and

the agreement was sent to Los Angeles where Mr. Denson was for his signature which accounts for the allegation in the complaint that he signed the agreement in Los Angeles and after the amended complaint was drawn, we learned that instead of signing it in Los Angeles when he received it, he came to Reno and went to Mr. Cooke's office and signed it there and paid the ten thousand dollars, so in order that that should conform with the facts, we ask the privilege of amending it so as to establish that fact.

The Court: Any objection to that amendment, Mr. Cooke? [116]

Mr. Cooke: Same objection, your Honor. We object to all this as material set up in the complaint.

The Court: Without prejudice to your privilege to raise any points on those motions, the amendment will be allowed and I think we can amend by the same method.

Mr. Platt: Yes, your Honor.

The Court: I think you had better state it so the record will be clear as to just what it is, so comparison can be made then with the rider.

Mr. Platt: Well, I propose, if the Court please, that the rider provides as follows: "Par. 8. That said agreement, Exhibit A, was prepared by the attorney for defendant, executed by the said defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., sent to the plaintiff by mail to Los Angeles, California, and later signed and executed by the plaintiff in the office of H. R. Cooke, attorney for the defendants, at Reno, Nevada."

The Court: Perhaps the term "as a rider" might not be exactly correct. You understand just what I mean.

Mr. Platt: And then to have the paragraph VIII go on, it is now alleged that since the execution of said agreement, plaintiff has always been ready and willing to receive from defendant, Irene Gladys Mapes, a lease of said hotel structure whenever tendered, or to join in the execution of such a lease, and defendants have been so informed and advised [117] by plaintiff. That will be paragraph VIII as amended, your Honor.

Then paragraph IX alleges in effect that the agreement provides that immediately the parties shall enter into a discussion with each other as to the terms, conditions and details of the lease and that said terms, conditions and details shall be mutually agreed upon between the parties herein within ten days after the written contract for the construction of said structure has been entered into by the first party and within ten days after the actual construction has been commenced and while there is a provision in said agreement that time is the essence thereof, this plaintiff alleges that the said defendants, by word, act and conduct upon the part of each and all of them, have waived said time provisions and with intention so to waive and with knowledge, understanding and recognition of such waiver, and each and all of them are estopped and foreclosed from disclaiming said waiver or asserting or claiming or relying upon said time provi-

sions, or any of them. Then the acts of waiver are set out. Repeatedly since the execution of said agreement and for a continuous period following the expiration of the time provisions hereinabove referred to, the said defendants, by word, act and conduct, have led this plaintiff to believe that such a lease would be tendered and would be properly executed by all of the parties hereto, and plaintiff placed full reliance on defendants' said word, acts and conduct. That almost continuously from the 24th day of September, 1945, the date of the execution of said agreement, up to and including the 1st day of April, 1946, all of the parties hereto have been conferring at various times and intervals and have treated and considered during all of said period of time said agreement to be continuous in full force and effect, with the belief on the part of the plaintiff and representation by said defendants that they were acting in good faith and would tender and execute said lease. On or about the 28th day of December, 1945, plaintiff, at the request of the defendants, met the defendant Charles W. Mapes, Jr., at the office of the architect of said hotel building in Oakland, California, for the purpose of discussing some changes in the plans of said building. During the month of March, 1946, plaintiff conversed by phone between Los Angeles and Reno with the defendant, Irene Gladys Mapes, about the hotel and the plans therefor. Plaintiff also told her that he would call the defendant, Charles W. Mapes, Jr., the next day and ask him to come to Los Angeles to look over plans for the

furniture and interior decorating. Later, by appointment between the plaintiff and defendant, Charles W. Mapes, Jr., plaintiff met the said defendant on or about April 1, 1946, together with an interior decorator of Barker Bros., Los Angeles, California, at the office of the architect of said hotel structure in Oakland, California. During the first part of January, 1946, [119] plaintiff went to San Francisco and interviewed the Dohrmann Hotel Supply Company and instructed said company to get out plans for the new equipment, designs and prices for dining rooms, kitchens, bars, and other matters appertaining to hotel equipment, all of which these defendants well knew. That in the same month of January, 1946, plaintiff came to Reno and conferred with the defendant, Irene Gladys Mapes, at her home in Reno, Nevada; that upon said interview the said defendant Irene Gladys Mapes, expressed pleasure with the progress being made.

Then we allege in paragraph X that during the period of time from September 24, 1945, which was the date the contract bears, up to and including about the 10th day of April, 1946, the said defendants retained plaintiff's ten thousand dollar cash deposit and never once during that interval of time offered to return it, nor did any one of said defendants during that interval of time, by word, act or conduct, lead this plaintiff to believe that said agreement would be repudiated and that they would not enter into and execute the lease as said agreement provides.

Then in paragraph XI it is alleged that in further recognition of the waiver by defendants of the time element hereinabove set forth and the estoppel herein, the said defendants caused to be published in local newspapers and trade journals featured and prominent illustrated articles, stating that plaintiff would conduct and operate said hotel.

Then it is alleged in paragraph XII that a lack of observance and performance of the time elements in said agreement above referred to was the fault of the said defendants and not of this plaintiff; that though plaintiff told defendants he was ready to sign a lease whenever they should prepare and submit it, no form of lease was ever tendered plaintiff by defendants, or any of them; that though the defendants had superior knowledge as to when final plans of said hotel structure were approved and when actual construction commenced, yet none of them disclosed said facts to this plaintiff, nor was an interview or conference sought for the final preparation of the lease. And it further alleges that said defendants, and each of them, are and were at fault and were neglectful and delinquent in not seeking or arranging such an interview or conference within any of the periods of time set forth in said agreement.

Then in paragraph XIII it is alleged that all the material and essential provisions of the proposed lease were and are expressly stated and set forth in said agreement as hereinabove more particularly alleged and the parties hereto expressly

agreed that such material and essential provisions should be contained within said lease; that all other customary matters and things usually contained in similar leases were and would be merely incidental and in accordance with [121] custom and usage.

Then paragraph XIV alleged that notwithstanding the continued acts, conduct and representations of the defendants as above set forth, and notwithstanding the binding obligations of said agreement and the ability of the defendants to perform, the said defendants personally, and through their attorney, on or about the 10th day of April, 1946, without cause or reason, repudiated said written agreement, declined and refused further performance on their part under it, and stated to plaintiff that no lease would be tendered, granted or entered into as said agreement provided. That no cause or reason was given plaintiff for such repudiation.

Paragraph XV alleges that plaintiff has fully and faithfully performed all acts and things, covenants and conditions in said agreement required of him to be performed, and has always been ready, willing and able, and is now ready, willing and able to enter into and execute said lease, as in said agreement provided, and fully and faithfully to perform in accordance therewith, and to comply with all of its terms, covenants, agreements and conditions.

Paragraph XVI alleges that it was at the special instance and request of the defendant, Irene Gladys Mapes, that her son, Charles W. Mapes, Jr., was

associated with plaintiff as a second party to said agreement. That plaintiff reposed sufficient faith and confidence in the said Charles W. Mapes, [122] Jr., to believe that he would faithfully carry out his obligations under said agreement and join with plaintiff in demanding and executing the lease, as in said agreement provided, but the defendant, Charles W. Mapes, Jr., has wrongfully, unjustly and inequitably, and in fraud of plaintiff's rights, conspired and confederated with his co-defendants in repudiation of said agreement. That plaintiff has always been ready, willing and able, and is now ready, willing and able, personally to assume, pay and perform in full all obligations, acts, or things required to be performed by the said defendant, Charles W. Mapes, Jr., under said agreement and lease, and to take and execute said lease in his own name.

Then we allege that plaintiff has no plain, speedy or adequate remedy at law.

We further allege that defendants have not done equity nor have they offered to do equity, and then we pray for a decree and the prayer is that a decree for specific performance of said agreement be made and entered into herein in favor of the plaintiff and against the said defendants. That the above-entitled court order a decree that within 20 days from and after the entry of said decree, or such other time as the court may determine, that said parties hereto be ordered and directed to execute and give a sufficient lease upon the hotel prop-

erty, with the exception of eight stores spaces on Virginia Street and three store spaces on First Street herein [123] particularly described, for a term of 20 years and for a rental price, consideration and conditions as in said agreement provided. That said lease shall provide that the plaintiff and defendant, Charles W. Mapes, Jr., at their own cost provide and place in said structure such furniture, fixtures and equipment as shall be suitable, proper and necessary to furnish and equip the same as a first-class hotel and apartment building, and that they shall execute and deliver to the defendant, Irene Gladys Mapes, a first chattel mortgage on said furniture, fixtures and equipment, and to be provided in said lease. That the court further order, adjudge and decree such other and additional provisions to be contained in said lease as to fully effectuate the intent and purposes of the parties hereto, as in said agreement stated, and also set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected. That the court further order, adjudge and decree, as an alternative, that if sound principles of equity would be best subserved and applied herein, that the plaintiff, solely and on his own behalf, and the said defendants execute said lease, as aforesaid, without the joinder of the defendant, Charles W. Mapes, Jr., as co-lessee therein. That the court retain jurisdiction herein to assure compliance with its orders, judgments and decree, and for such other relief as

in equity may be mete and proper, and for costs. Does your Honor desire the agreement read?

The Court: It might be well to consider that.

Mr. Platt: It is attached to the amended complaint. The agreement is as follows: (Reads agreement.)

The Court: Do attorneys for the defendants desire to make any statement?

Opening Statement of Mr. Cooke

Mr. Cooke: Possibly I can narrow this down somewhat by stating substantially what is really at issue in the case. There are considerable allegations set up in the amended complaint which we do not deny, many of them are denied, some denied with an explanation and so on. Primarily, it is the position of the defendants in this case that this action must be determined by reference to the written document alone and that it cannot be twisted around with allegations or evidence or materially changed in any respect as proposed. We have made objections, and we will continue to make objections throughout to the admission by the court to any evidence of these various telephone conversations and these bits of talk here and there had between the parties, as having any bearing upon how your Honor should construe the written document. That document must be allowed to speak for itself and as a matter of law it does not concede a contract to be specifically performed, or a contract at all,

because it says on its face that the parties never met on the particular conditions.

Now paragraph I of the amended complaint, which [125] alleges jurisdictional matters, in part is admitted, that is to say the citizenship and the amount of controversy, but we find an allegation there that Charles W. Mapes has declined and refused, and still declines and refuses, to join the party plaintiff therein; that he is a son of the defendant, Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, that particular portion of paragraph I in the amended complaint is admitted, but then follows this: “* * * and has conspired and confederated with the said defendants, Irene Gladys Mapes, Gloria Mapes, and said co-partnership, to defeat the said plaintiff out of his just rights and equities herein.” That is denied.

Then paragraph II, which alleges that the defendant Charles W. Mapes Company, a co-partnership, was organized on or about the 9th day of November, 1943, and ever since has been and now is conducting, carrying on and transacting business and has never since been dissolved, is admitted.

Paragraph III alleged that at the time this document of September 24, 1945, was executed Irene Gladys Mapes was seized in fee of the property therein described, consisting of an area on Virginia Street of 167.64 feet, is admitted, with the exception that 12 feet in controversy should be deducted therefrom. It is 155.64 feet on Virginia Street that she was seized in fee of and not the amount stated

in the instrument. I might interpolate here that the 12 feet which she was seeking at that time to acquire from the City of Reno was by the city [126] council, after repeated efforts on the part of Mrs. Mapes, refused, the council apparently deeming it should be held as part of the street instead of being conveyed to Mrs. Mapes.

Then paragraph IV of the amended complaint sets up that on or about November 6, 1945, Mrs. Mapes conveyed by deed of conveyance to herself, Charles W. Mapes, Jr., and Gloria Mapes, co-partners, doing business under the name of Chas. W. Mapes Company of Reno, Nevada, the real estate described in the agreement of September 24, 1945. That is admitted. Then it is alleged that said conveyance, at the time of its execution and prior thereto was made with the knowledge by all of the defendants of the existence of said agreement. That last clause is denied. It goes to the question of Gloria Mapes, who acquired the property, one-third interest in the property, after September 24, 1945, whether she had knowledge of the alleged agreement and arrangement and so on with Mr. Denson. Of course, there is no question but what the defendants, Charles W. Mapes and Mrs. Mapes, knew of the arrangement and agreement, but the issue there is as to Gloria Mapes.

Paragraph V of the complaint alleges that on the 24th day of September, 1945, the above named plaintiff and above named defendants, Irene Gladys

Mapes and Charles W. Mapes, Jr., entered into a written agreement whereby the defendant, Irene Gladys Mapes, agreed to grant a lease to said plaintiff and [127] said defendant, Charles W. Mapes, Jr., of a certain new fireproof hotel, apartment building, and so on. That is denied by reason of our construction that this agreement of September 24, 1945, was merely a preliminary agreement that was substantially the same as talks and discussions of what the written agreement, later to be executed, would contain, and that it of itself was not an agreement for a lease binding upon either of the parties, either Mr. Denson or Mrs. Mapes, so we deny that there was any agreement that we grant a lease. Of course, the document speaks for itself. We agree that we may later and have certain discussions and agree upon a lease if we can, that is the language of the document, and further that no lease should be effected in any event until plans and specifications had been agreed upon, and those were never agreed upon, so that is the reason of that allegation. Of course we admit the physical act of signing that particular paper, but whether it is the kind of agreement that they allege here is entirely another matter. We deny that said agreement is certain or definite or just or reasonable or mutual in its obligations or in all of its material parts. That to my mind, with my knowledge of pleadings, is improper and incompetent. The document must be allowed to speak for itself and to say that a document is valid and legal in your pleading is not necessary and takes up that

much space, that is my view of that, so we deny that it is either certain, definite, reasonable or just. It is immaterial and those are matters, of course, I think, of [128] law that would be subsequently taken up and concerning which we believe we are entirely prepared to justify our position to the court.

The rental consideration is alleged and that already appears in the document itself and it does not appear to me what avail or benefit to the court, or to anybody, to set up that again, but they state the same things in this paragraph as to terms of agreement as in regard to the gross receipts as stated in the agreement itself, and of course we admit that document contains those provisions with reference to the percentage of the receipts to be paid as rental, and they allege that the written agreement expressly acknowledges valuable and consufficient consideration present and received, and that is another allegation that I submit is subject to the criticism I have made and we will hear more from it later on probably, but we have admitted that the written document does contain the things that they say.

Paragraph VI, first paragraph is subject to our legal objection as to materiality and propriety of that type of pleading being injected into the case. We deny that the plaintiff, at the request of the defendant, Irene Gladys Mapes, engaged the architect and contractor now constructing the hotel building on said premises and as to whether he

conferred upon many or any occasions with the architect or with the contractor employed on the work or with the members of their official [129] staffs, or as to whether the plaintiff expended the necessary or any time or expense for attendance upon said conferences, that we have no information or knowledge with respect to that matter sufficient to base a belief. As to conferences with the defendant, we deny the allegation as to that. Further it says in this same paragraph: "The said plaintiff, at the request of the defendant, Irene Gladys Mapes, secured a large and appreciable loan for the said defendants * * *," etc. Well, we have had a statement from counsel as to that loan. We deny that he secured any loan, large or otherwise, to finance the construction of the hotel, and we deny that Irene Gladys Mapes was unable to negotiate through other channels this proposed loan. I might say here, in anticipation of the rider amendment, that the denial will go to that also and I think about the only change made was that the plaintiff made attempts to secure the loan and that he had assurance from financially responsible people that they would grant the loan and he so informed Mrs. Mapes, and we will deny all of that, except perhaps attempts, which we deny for lack of information or knowledge sufficient to base a belief that he made attempts.

Paragraph VII it is alleged that in order to carry out the terms, conditions and covenants of said agreement, by way of part performance thereof on

his part, and all within the knowledge of said defendants and each of them, this plaintiff obtained plans, specifications and prices from various firms, etc. That is denied for lack of knowledge or information as to whether he did these things or not. Naturally we do not have any definite knowledge about it. It is further alleged that as a further consideration the plaintiff, relying on good faith of defendants and with their knowledge, sold at a considerable financial sacrifice a hotel of which he was the sole owner and proprietor. That is denied in the same way, that we have no knowledge or information on which to base a belief as to the sale of the hotel at a sacrifice, considerable or otherwise. And it is alleged that good and valuable considerations, in said agreement provided, were and are fair, just and equitable to said defendants herein, and each of them. That is denied without any qualifications, being one of our contentions in this case that the agreement, as set up, providing for the payment of rental, if it were to stand as a lease for the 20 years, would be very far from being fair, reasonable and equitable to the defendants, in that it would not produce an income or rental that would be even one-half of what the fair, reasonable and equitable price should be. That, of course, is very material in these specific performance cases, because courts will not enforce agreements that are not in every respect fair.

Paragraph VIII it is alleged that the said agreement, Exhibit "A", was prepared by the attorney

for the defendants. We will have another amendment to that changing something [131] there with regard to where it was signed by the plaintiff, which doesn't materially change the sense and substance of the allegation. The allegation that the agreement, Exhibit "A", was prepared by the attorney for defendants it denied in part, the denial being to the effect that a document prepared by Mr. Denson and furnished by Mr. Denson was handed in and it was copied in substance, with some more or less slight additions so that it was in a sense a sort of a joint production of the attorney for the defendants and the document that was furnished by Mr. Denson, so it is correct to say that it was prepared by either, but three-fourths of it was prepared or furnished by Mr. Denson. That is how the agreement was arranged, as set up by the defendants. Then the balance of that is where it was signed, has been changed slightly, but we reserve the right to enter such denial as we think proper when the rider amendment is served.

Now it is alleged that since the execution of said agreement plaintiff has always been ready and willing to receive from the defendant, Irene Gladys Mapes, a lease of the said hotel structure when it was tendered, or join in the execution of such a lease, and defendants have been so informed and advised by plaintiff. The last clause, "and defendants have been so informed and advised by plaintiff," is denied by the defendants, at least up to the time of the filing of the suit. The answer sets

up more particularly the various steps [132] that that occurred preliminary to the final decision and notice that they would not execute any lease to the plaintiff. That as to the plaintiff being always ready and willing to receive from defendant a lease of the hotel structure we deny that for want of knowledge or information sufficient to base a belief. The testimony, I think, will clarify that as to the attitude of the parties and that Mr. Denson was requested to come to a settlement and agreement with regard to the lease that was foreshadowed by the agreement of September 24th and he refused to do so, that is to say, he failed and neglected to do the things necessary to get a meeting.

Paragraph IX alleged that while the agreement provides that the parties thereto shall immediately enter into a discussion with each other as to the terms, conditions, etc., they have ten days after the actual construction has been commenced, and it further provides that time is of the essence thereof. It then alleges that defendants, by word and act and conduct upon the part of each and all of them have waived such time provision. That is denied, that we have waived any. And that with intention so to waive and with knowledge, understanding recognition of such waiver, that is denied; "and each and all of them are estopped and foreclosed from disclaiming said waiver," that is denied, "or asserting, or claiming, or relying upon, said time provisions or any of them," that is denied. We certainly intend to rely upon the time provisions

and to put in the evidence that we are entitled and justified in relying on that. Then it is stated that repeatedly, since the execution of said agreement and for a continuous period following the expiration of the time provisions referred to the said defendants, by word, acts and conduct have allowed the plaintiff to believe that such a lease would be tendered and would be properly executed by all the parties hereto, and plaintiff placed full reliance upon such words, acts, and conduct. That is all denied and subject to our objection that it is wholly and vitally defective and insufficient, does not state any facts. And then they go on "That almost continuously, from the 24th day of September, 1945, the date of the execution of said agreement, up to and including the 1st day of April, 1946, all of the parties hereto have been conferring at various times and intervals," that is denied, with the qualification that there were some informal conferences and that shortly after the 1st of April, 1946, the defendants demanded that the plaintiff come to a conference for a final settlement of the whole question of whether a lease should be granted or should be agreed upon, it being their position that the lease that was suggested and foreshadowed by the agreement of September 24th was out, but they were willing nevertheless to discuss with him the granting of a lease on the property down to April 10, 1946, and he refused to come and said he had an agreement that was sufficient for him and was going to have that [134] specifically enforced, etc., and so on, and that was the end of it. Now it is alleged

that the defendants had considered during all of said period of time the said agreement was in continuous full force and effect, with the belief on the part of the plaintiff, and representation by the said defendants, that they were acting in good faith, and would tender and execute said lease. That is also denied, except with the qualification I just stated, that at no time as mentioned there, namely in the late spring of 1946, did the defendants ever make any statement or representation of any kind to the plaintiff that they would execute a lease along the lines of the one mentioned in the September 24, 1945, document, that if there was going to be a lease it would be a brand new document and upon such terms and conditions as the parties might then elect. Then it is alleged that "on or about the 28th day of December, 1945, plaintiff, at the request of defendants, met the defendant, Charles W. Mapes, Jr., at the office of the architect of said hotel building in Oakland, California, for the purpose of discussing some changes in the plans for said building;" that is denied. "During the month of March, 1946, plaintiff conversed by phone between Los Angeles and Reno with the defendant, Irene Gladys Mapes, about the hotel." There was a conversation admitted by the defendants. It was in March, but it was after March 18th. "* * * and the plans therefor." And the allegation continues: "Plaintiff also told her that he would call the defendant, Charles W. Mapes, Jr., and ask him to come to Los Angeles to look over plans for furniture and interior decorating." That is denied. There was no

such talk between Mrs. Mapes and the plaintiff. "Later, by appointment between plaintiff and the defendant, Charles W. Mapes, Jr., plaintiff met the said defendant on or about April 1, 1946, together with an interior decorator of Barker Bros., Los Angeles, California, at the office of the architect of said hotel structure in Oakland, California." That is denied. Then it is alleged that during the first part of January, 1946, plaintiff went to San Francisco and interviewed the Dohrmann Hotel Supply Company and instructed said company to get out plans for new equipment, designs and prices for dining rooms, kitchens, bars and other matters appertaining to hotel equipment, all of which these defendants well knew. As to whether he went to San Francisco and interviewed the Dohrman Company as alleged, we say that we have no knowledge or information sufficient to base a belief, so we are not denying absolutely that that was done, but only in a legal sense and in a legal manner that we had any knowledge of his going to interview the Dohrmann Hotel Supply Company as stated whatever. Then it is alleged in the same month of January, 1946, plaintiff came to Reno and conferred with the defendant, Irene Gladys Mapes, at her home in Reno, Nevada. The fact that he came here is admitted. "That upon said interview the said defendant, Irene Gladys Mapes, expressed pleasure [136] with the progress being made." That is denied.

Then the next paragraph of the amended complaint sets up that during the period of time from

September 24, 1945, the date of the execution of said agreement, up to and including about the 10th of April, 1946, the said defendants retained plaintiff's \$10,000 cash deposit, never once during that interval of time offered to return it, nor did any one of said defendants during that interval of time, by word, act or conduct, lead this plaintiff to believe that said agreement would be repudiated, and that they would not enter into and execute the lease as in said agreement provided. That is all denied, with the exception that the deposit that is made—I will have to turn to the answer to find out exactly what we did say about that, but the defendants aver in their answer, as I recall, that they knew in advance that the deposit wouldn't be accepted, the return of it wouldn't be accepted. Further, a return of the money was tendered and was refused, but I think possibly I will have to get the exact dates which we set up in our answer.

Paragraph 11 alleged that “* * * in further recognition of the waiver of defendants of the time element hereinabove set forth and the estoppel herein, the said defendants cause to be published in local newspapers and trade journals, featured and prominent illustrated articles stating that plaintiff would conduct and operate said hotel.” That is denied. It is not [137] clear to the defendants just how the plaintiff is setting up before this Court a denial on his part that a contract was made admittedly to himself and one other party should be reconstructed and changed by the Court and made to run to him

alone. That is going to be a sharp issue in the case, as to whether this Court can consider the form of any agreement other than the one the parties made. If your Honor finds an agreement was made here, it is the position of the defendants that your authority and power is limited to that particular document, which must be in writing under the statute, unless there is some proposition under operation of the law brought legally into the case, and that this allegation here that the defendants caused publication to state that the plaintiff alone was to operate the hotel, is not evidence of any agreement entered into between the plaintiff and defendants.

Now paragraph 12 alleges that lack of observance and performance of the time elements in said agreement was the fault of the said defendants and not of plaintiff. We deny it however. "That though plaintiff told defendants he was ready to sign a lease whenever they should prepare and submit it * * *." We deny he ever told us he was ready to sign any lease whenever submitted. We admit no form of lease was ever tendered him by the defendants or any of them. Plaintiff alleges: "That though the defendants had superior knowledge as to when final plans for said hotel structure were approved and when actual construction commenced, yet none of them disclosed said facts [138] to this plaintiff * * *." That is denied, that is to say, we deny that we had any superior knowledge as to when the hotel structure was actually commenced to be constructed, that the plaintiff knew about that par-

ticular fact as much as we did. Then it is alleged that we didn't seek an interview with the plaintiff or conferences for the final preparation of the lease. That is denied as to a lease, not particularly as to the one referred to in the September 24th agreement. The plaintiff further alleges that said defendants and each of them are and were at fault and were neglectful and delinquent in not seeking or arranging such an interview or conference within any of the periods of time set forth in the agreement. That is what I would call another incompetent and immaterial pleading, but anyway we deny it.

Thirteen, it is alleged that all the material and essential provisions of the proposed lease were, and are, expressly stated and set forth in said agreement, as hereinabove more particularly alleged, and the parties hereto expressly agreed that such material and essential provisions should be contained within said lease. That all other customary matters and things usually contained in similar leases were and would be merely incidental and in accordance with custom and usage." We have denied that and we set forth what we consider to be material and essential matters for a lease of a building to cost a million and a half or thereabouts and run for 20 years [139] would be and I will call your Honor's attention to this a little later on, but we have denied the allegation in the form it is made.

Paragraph XIV it is alleged that "* * * notwithstanding the continued acts, conduct and represen-

tations of the defendants, as above set forth, and notwithstanding the binding obligations of said agreement, and the ability of the defendants to perform, the said defendants personally and through their attorney, on or about the 10th day of April, 1946, without cause or reason, repudiated said written agreement, * * *” etc. We have denied that “notwithstanding * * * obligations.” Of course, we deny there were any binding obligations. We admit the ability of the defendants to perform. We deny that the defendants personally and through their attorney, on or about the 10th day of April, 1946, without cause or reason repudiated said written agreement. Of course, that is on the basis there was nothing to repudiate and the document speaks for itself. “* * * and that they declined and refused further performance on their part,” that is denied with some further argument that will be disclosed by the answer. “* * * and stated to plaintiff that no lease would be tendered, granted or entered into, as in said agreement provided.” That is admitted as of the date approximately the 10th day of April, 1946. “That no cause or reason was given plaintiff for such repudiation.” That is denied. [140]

Fifteen, the allegation is that plaintiff has fully and faithfully performed all acts and things, covenants and conditions in said agreement required of him to be performed, and has always been ready, willing and able, * * *” etc. That is all denied. We never made any agreement to give any lease to

Mr. Denson alone. However ready and willing he is individually, that is not a performance of the agreement.

Paragraph XVI alleges that it was at the special instance and request of the defendant, Irene Gladys Mapes, that her son, Charles W. Mapes, Jr., was associated with plaintiff as a second party to said agreement. That is denied without qualifications and without any strings, and then it is alleged that the plaintiff reposed sufficient faith and confidence in the said Charles W. Mapes, Jr., to believe that he would faithfully carry out his obligations under said agreement and join with plaintiff in demanding and executing the lease, as in said agreement provided. We deny that for lack of knowledge or information upon which to base a belief as to whether plaintiff reposed confidence and faith in his alleged co-tenant, Charles W. Mapes, Jr. Then follows the allegation, "But the said defendant, Charles W. Mapes, Jr., has wrongfully, unjustly and inequitably, and in fraud of plaintiff's rights, conspired and confederated with his co-defendants in repudiation of said agreement." That is denied. It is a mere conclusion without a statement of a single fact upon which it is based. Then follows the further [141] allegation, "That plaintiff has always been ready, willing and able, and is now ready, willing and able personally to assume, pay and perform in all obligations, acts, or things required to be performed by the said defendant, Charles W. Mapes, Jr., under said agreement and

lease, and to take and execute said lease in his own name." There again we have the remarkable proposition that this Court is to execute an agreement and require the defendants to specifically perform something that they never agreed to.

Paragraph XVII alleges that he has no plain, speedy or adequate remedy at law. That is denied upon the hypothesis that he is not entitled to any remedy whatever. He hasn't been hurt.

Paragraph XVIII alleges that defendants have not done equity nor have they offered to do equity. We deny that also.

Now turning to the answer to the amended complaint, which has been gone over rather fully, but there is some portion of it I want to call to your Honor's attention. We have set up special defenses and the first one is as follows: (Reads I from Answer). The second affirmative defense reads as follows: (Reads II from Answer). For a further and third defense it is alleged: (Reads paragraph (1) under third defense). That may possibly be answered by the proposition as suggested by Mr. Platt on oral argument, that the lease be a [142] personal and private relationship of a confidential character, which would prevent it being assigned, irrespective of there being any clause against assignment, but in order to make assurance doubly sure in the lease for that long period of time and where the parties thereto might pass away from the scene before the expiration of the lease, there usually are, I would say and necessarily are, pro-

visions as to what shall be done, whether the lease shall pass to the successors in interest or whether it shall terminate or whether it may be assigned, etc. Now that is (1). Second (reads 2). That is another clause that would be very material to the lessees so as to cover transfer of title or cover transfer of possession, substitution of parties that the lessors might not be willing to have in there for a minute. They might be entirely willing to have Mr. Denson and Charles W. Mapes in there, but would not be willing to have John Brown or John Doe in there as receivers or as assignees or as legal representatives in case the lessees died. That is a clause that I say is essential to a lease of that long period of time. For a short period of time it wouldn't be so important.

Then a clause we say should go into that lease and should contain matter and provisions, etc., to protect the rights of the parties, that should be a clause that required the lessees to keep true books of account and give lessor right of free inspection and audit. Your Honor will recall from [143] reading the agreement that the method of their paying rental is a percentage of the gross sales, so that in that respect the lessees and the lessors are in a sense benefactors. It is true that the percentage is fixed, but payment to the lessors is fixed in respect to business by the lessees and lessors would be vitally interested in knowing that accounts were correctly kept in order to know that the correct rental was accounted for by the receipts, so that is absolutely

necessary in a lease of this kind, that they not only have the right to know that true books were kept, but also the right of inspection at all reasonable times and have them audited.

As to the 4th proposition set up in their answer, there is a clause in the lease that the lessees agree to pay a rental that will take care of the amount requited for the payment of taxes by the lessors on this building, and also an amount for upkeep on the building and also for insurance on the building and also for the interest on the money borrowed by the lessors and also for an amount annually for the amortization of the cost of the building. That is a firm and definite provision of the agreement, so we say that the lease, if and when one was prepared, would necessarily have to specify and clarify more fully than this preliminary document did, because it contained nothing as to the details. The lease would have to provide something about the amount for insurance, something for each of these items. It says borrowed money, it [144] does not say whether money borrowed on the building or borrowed for other purposes, and there is no method by which this Court or anybody can take September 24th agreement and determine what the minimum guaranty rental would be under that clause. At least that is our contention, so we say as to the fourth objection or rather clause, that we think should go into the lease for the protection of the parties as provided hereby, a clause or clauses that clarify this Paragraph 9 of the exhibit which contains the items that are mentioned.

Another one specified as (5) is as to what should constitute suitable, proper and necessary fixtures and equipment and whom, if any one, shall have power of determining in case the parties are unable to agree. Your Honor will recall that there is one paragraph in the September 24th document that provides that Mr. Charles W. Mapes and Mr. Denson, the plaintiff, should purchase, at their own expense, and install in the hotel furniture suitable and necessary for a first-class hotel and the cost should be \$150,000 or not less. That leaves open, as we see it, a question that would necessarily have to be determined in the lease itself as to what kind of furniture should be installed. To simply say \$150,000 worth of furniture to furnish and equip a first-class hotel——

Mr. Platt: It does not say that. I beg your Honor's pardon. The agreement does not say that the amount is to be \$150,000. The agreement says as "now estimated." The agreement [145] provides that sufficient money shall be expended by the lessees as to suitably and properly furnish the hotel and \$150,000 is only inferred the minimum amount.

Mr. Cooke: I think that is a difference between twiddle-tum and twiddle-dee. That is the figure they had in mind, \$150,000, but whether it is that figure or more or less is not the point I am talking about. The point I am talking about is who is going to determine the furniture that is suitable and necessary. How is your Honor going to do it granting a decree of equity? There is nothing in the September 24th agreement that pertains to that subject at all, so that would be a standard proposi-

tion right there. That is our idea at least, your Honor, in setting up this objection.

Paragraph 6, your Honor will recall that in the agreement there is a rather peculiar provision, the garage which your Honor was asked to decree particular performance on and which it seems to us you would have to reach out into thin air in order to make any decree at all. If the lease is to include the garage, your Honor will note that this agreement here apparently does not include it, but they say if the lease shall include the garage, then the second parties shall pay monthly 10% of the gross garage receipts or, if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon. The first part of that, "10% of the gross garage receipts" can be developed so far as certainty and definiteness is concerned, but the clause there that that if the lease is to contain the garage at all, is certainly indefinite. Your Honor couldn't make a decree, it seems to me at least, that the lease was to include that because the parties left that open but the clause of that determination, "if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon," that, of course, means that they should get together later on and find out what terms would be applied. It is not a case where the Court can instruct an agreement for that, because the Court might miss it a mile. That is reserved, as we see it, for the purpose of being agreed upon later on. It is not foreshadowed in

any way by the September 24th agreement, so we set up then in our answer that is one of the things that are material and would be material and necessary in the lease if and when one was executed. Counsel for the plaintiff, I think, undertook to dispose of that clause in the oral argument—it was a small, little thing to talk about, this being a lease for 20 years and running into big money, and so forth, but we expect that isn't the reason. The parties didn't think so because they specifically refer to it in their argument and it was reserved for further agreement and the garage privileges to a hotel such as this structure is under course of construction [147] under a period of 20 years, I would say it can not be disposed of in any haphazard manner as that.

Now we have 7. 8 and 9, which purport to provide chattel mortgage to be given for security of rental payments, and we think if a lease would be drawn, it would be necessary to particularize as to the conditions under which it should operate for warranty of rental payments. You have to take into consideration the paragraph in regard to percentage, you have to take into consideration the paragraph in regard to taxes, upkeep, insurance, interest on borrowed money and amortization. Those items would be supposed to be secured by the chattel mortgage, as it would be if the lease was drawn, and counsel would work the thing over carefully as they would on a long term document, they would be able to particularize that to the satisfaction of the parties, but that is not there entered and that is one of the

vital shortcomings of the document we have here now as a 20-year lease.

The next paragraph is a clause that ought to be necessarily in leases as to the nature of non-compliance. Some leases, for instance, might provide that in case of non-compliance the lessor should serve 15 or 20 days' notice on the lessee to correct default within that time and other matters notice probably longer or shorter, also there should be a provision in the lease that in the event of default it is mutually understood time is of importance, because in a long-term [148] lease, where there are a multitude of things to be done on the part of the lessees, there will delays occur many times, defaults or claimed defaults, and there ought to be some specific provision guiding the parties in determination of the question, so we say that this is a necessary provision that should be in the lease.

Then a further one is that the lessees shall comply with the laws of the State and with local ordinances, statutes and regulations. A lease of this kind would be governed by the local ordinances and regulations of the health department, sanitary officials, etc., and this says, as we see it, that a lease of this kind on that kind of property should contain very specific clause to the effect that the lessees should at all times comply with those requirements and that a failure to comply would operate as a default if the lessors wanted to claim it, that they could enforce it by calling for performance or claiming a defaultage and another clause that is common in leases of this

type is the one indemnifying the lessors against damage to the lessor or other tenants resulting from overflow or breakage of water or sewer pipes or damage from leakage. Take in small buildings those questions frequently arise as to who is to pay it, the landlord or tenant and we feel there should be a specific clause to cover that, so there will be no controversy over what should be done. "Lessor not to be liable for damages caused lessees by reason of any acts [149] of other tenants of the building." That is another clause that we find in the books and we find in our own experience very frequently, not invariably but frequently and almost invariably and at least in a lease of any size, is inserted at the request of the lessor so he will not be held responsible for the neglect or negligence of other tenants. So in this building, we know that the stores on the ground floor will be occupied by parties who are not under this lease at all, they are excepted from this arrangement here with Mr. Denson; now if those parties did anything that injured Mr. Denson, it would be a question there as to who would be responsible as between the lessor and the lessee, Mr. Denson, so that that ought to be covered.

Then the further clause in regard to the charge of public utilities, such as heat and light and power and water and all that sort of thing. Failure on the part of the lessee to take care of those items would be a very important item, whether if he does not take care of it, constitutes a default. If it isn't in the lease, however, it wouldn't be a default, as I view it.

"13. Lessees to keep leased premises in repair and whether or not additions or improvements made by lessees are to remain on the property at the end of the term." That is an essential clause in all leases, both long-term or short-term, particularly long-term, and 14 is one that may or may not [150] be particularly important to the lessor. Those are some 14 propositions that we thought important enough to set up as clauses and we think frankly counsel for both lessee and lessor would insist upon being incorporated in some form or other in a final lease to be drawn covering this period of 20 years.

(Noon recess taken.)

2:00 P.M.

All attorneys present as at morning session.

The Court: Are you ready to proceed gentlemen?

Mr. Platt: Yes, your Honor, ready for the plaintiff.

The Court: Mr. Cooke?

Mr. Cooke: I think before the recess was taken I was finishing with statement as to defendants' third defense which set up the various things that the defendant contends would necessarily be included in a lease. The 4th defense reads as follows: (Reads (a) 4th defense in Answer.) The allegation as to the commencement of the work is not entirely clear. The demolition of the building, I think, was commenced on November 10, 1945, and that continued and funds were obtained for the construc-

tion of the new building and work pursuant to the plans, etc., for the new building was commenced on January 25, 1946, so you have a question there as to whether the demolition work was construction work or whether it wasn't. (Reads balance of 4th defense.) [151]

The 5th defense reads as follows: (Reads 5th defense.) That is where it is alleged on account of her son, Charles, being taken in on the deal that she is willing to consider Mr. Denson as co-lessee. That is the 5th defense.

The 6th defense is as follows: (Reads 6th defense.) Your Honor will recall there are two minimum rental provisions in the talk, one being arrived at by certain per cent of the gross proceeds, another is a guarantee that the amount to be paid will be sufficient to pay the taxes and upkeep and interest, etc., so that the two are substantially the same, but there is another fact there that may be kept in mind, is that the second guaranty refers to the entire building and the entire building contains, as we know, some 11 stores on the ground floor and what the plaintiff is undertaking to do there by that paragraph in the proposed lease would be to guarantee that income from the 11 stores and then an amount to be paid from the lessees to the lessor for the hotel part of the building would be sufficient, all taken together, to take care of upkeep and taxes and insurance and interest and so on, and also provide for amortizing the cost of the building. "That

the fair and reasonable net rental for said premises under the same conditions as to time, not including the said 8 store spaces on Virginia Street and 3 store spaces on First Street, would be not less than \$25,000.00 per month, and inclusive of said store spaces, the fair and reasonable net rental would be not [152] less than \$30,000.00 per month." So according to that, the amount that is guaranteed is about one-third of the amount that the property will reasonably bring, according to the allegations. "That as defendants are informed and believe and so allege the fact to be, the cost of placing in said hotel structure such furniture, fixtures and equipment as should be suitable, proper and necessary to furnish and equip the same as a first class hotel and apartment building will be at least \$300,000.00, and not \$150,000.00 as mentioned in Paragraph 4 of said Exhibit A." That is the 6th defense, and the prayer of the defense is: (Reads prayer.) Signed by counsel.

The answer made is in considerable detail by reason of meeting, or endeavoring to meet, the case made by the plaintiff outside of the written document as to these alleged violations, what was said and done or not said and done, but it is our contention, your Honor, that the whole case must necessarily depend on the written document and that collateral matter, as pleaded on both sides, is irrelevant and immaterial. [153]

P. G. DENSON

the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. Will you state your full name please?

A. Peter G. Denson.

Q. You are the plaintiff in this action?

A. I am.

Mr. Cooke: If the Court please, at this time I take it that it is the intent of the plaintiff to offer evidence in support of their complaint. I wish to make an objection to the admission in evidence of any evidence, oral or documentary, other than the September 24, 1945, document, upon the following grounds:

(a) That the plaintiff's amended complaint affirmatively shows that the plaintiff never had, or has up to now, any cause of action for relief, in that the September 24, 1945, document never became a valid contract, in that no discussion of terms or proposed lease was had within ten days or as therein expressly provided for;

(b) That said Exhibit A never became a contract, in that it purports to be merely a memorandum of a preliminary arrangement for the parties to later enter into a formal agreement, including many covenants and agreements not mentioned in said Exhibit A.

(Testimony of P. G. Denson.)

(c) It affirmatively appears that said Exhibit A was not intended by the parties thereto to constitute any binding or enforceable agreement.

(d) That said Exhibit A shows upon its face there was no meeting of the minds of the parties of the essential conditions of the proposed lease.

(e) That said Exhibit A calls for the construction of a large hotel building at the stated estimated cost of eight hundred thousand dollars and requiring over a year for construction and which, if specific performance were decreed, would require continuous supervision by the Court of said work and construction.

(f) That said Exhibit A is neither fair, reasonable or equitable as to the defendants in that the rental therein provided for would only amount to between nine thousand and ten thousand dollars per month, whereas the reasonable rental value of said entire hotel building would be not less than thirty thousand dollars per month.

(f) That is affirmatively appears that the plaintiff had not performed, or tried to perform, conditions in said Exhibit A as to deposit of 20 thousand dollars as a guaranty of good faith, as provided in paragraph 1, Exhibit A.

(h) Exhibit A is not sufficiently clear or definite so as to enable a court of equity to decree specific performance.

(Testimony of P. G. Denson.)

(i) That said Exhibit A affirmatively shows that it left material terms of proposed lease for future negotiations and hence no specific performance or any relief is available to plaintiff,

(j) Exhibit A is not a contract, either at law or in equity, in that the minds of the parties never met.

(k) Said Exhibit A provides inter alia that approval in writing by the parties of plans and specifications must be had before any lease on the premises shall become effective, and no such approval has been had.

(l) That said Exhibit A is unenforceable as to specific performance, in that mutuality of obligation and remedy is wanting and defendants could not compel plaintiff to operate or manage said hotel.

Those objections, if your Honor please, some of them were argued and presented at some length on the motion to dismiss some time ago, on which your Honor has ruled, and I do not want to take up any time with those and but very little time with the remainder, but because we do not at this time ask the court to hear us extensively in an argument, it is not to be taken as any evidence that we waive any of those objections or that we haven't full confidence in their legal correctness. It is a case, however, where the witness should be allowed to testify to whatever the Court rules is proper and then the

(Testimony of P. G. Denson.)

matters can probably be taken up later on. But we have two or three objections that are fundamentally upon the terms [156] of the contract, which your Honor recalls specifically provides in one place that the parties will agree, or at least they would meet and have discussion and agree if they can, upon a lease. The language "if they can" seems to be pregnant with quite a number of interesting legal consequences. Primarily it, of course, says that the parties at that time had not definitely agreed and we contend did not intend by Exhibit A to agree to bind themselves to a lease, simply anticipating more talk about this lease and agree if they can and we think that under the authorities a document purporting to be a preliminary agreement, such as this one was held to be, unilateral—they are held to be in fact no contract, because it is simply a memorandum the parties will do these things if they can agree, and that qualification, "if they can" is parenthetically the competent proposition in the contract, and here it appears that they couldn't and didn't.

The same basis is for our objection (d), that the exhibit shows on its face there was no meeting of the minds, no meeting of the minds on the essential conditions of the proposed lease. That goes to the clause where it is provided in that document that there should be in a lease, if one is finally agreed upon, such further conditions as were necessary for the conservation and protection of the rights of the parties, and naturally the conclusion would be from

(Testimony of P. G. Denson.)

that that the exhibit itself was not intended as a contract, when the [157] parties said they would later undertake to agree on one if they could and then they would include these other clauses that might be deemed at that time necessary. And the same argument applies to our numerical (e) of the objections that the exhibit shows upon its face there was no meeting of the minds of the parties of the essential conditions of the proposed lease. The essential conditions are the same on that as pointed out in those 14 specifications in one of the defenses, that the exhibit calls for construction of a large hotel building at a stated estimate cost of 800 thousand dollars, having a year or more to run for completion. That brings the case, or at least the objection is based upon that idea, it brings the case within the doctrine that a Court will not undertake the supervision of a building that requires continued looking after from time to time to see if the agreement is complied with. Here this agreement calls for construction of this building over here, estimated at 800 thousand dollars. Of course, the cost has gone very much in excess of that, but that was the estimated cost at the time and it was stated it would be finished about on or about January 1, 1947. Now if a specific performance were decreed at or about that time, or even now, we have under the terms of the contract considerable time to run, but I think that the time element there would be somewhere near with the time when construction

(Testimony of P. G. Denson.)

work began, which was in November or January, 1945 and 1946, so if the Court made a decree for specific performance, [158] we would have this picture, the Court sitting here and listening to evidence from time to time as to whether the contract was being carried out, because the decree would require Mrs. Mapes to go on and construct that building according to the plans and specifications agreed upon, if any, so if the building was not made as Mr. Denson thinks it ought to have been and he would come to, the Court and report to the Court they were not doing as the contract called for, and your Honor would have to render evidence and enter a decree and so on from time to time and it is with the view under the authorities that it is not the business of courts to enter into construction business or supervise construction, that contracts of that type will not be specifically enforced.

Then our ground (f) is one as to reasonable value of the rental as compared with what they agree to give. That depends upon the evidence in the case and it doesn't become a legal proposition in the case, and if, as we set up, the reasonable rental of the building is three times again what they agree to pay, then under all the authorities on that subject the agreement would be so unfair and one-sided that no court of equity would enforce it, regardless how definite and complete it might be in other respects.

Then paragraph (g) that it affirmatively appears

(Testimony of P. G. Denson.)

that the plaintiff has not performed, nor offered to perform, the conditions of said Exhibit A as to deposit of 20 thousand [159] dollars as guaranty of good faith, as provided in paragraph 1 of said Exhibit A. That objection appeared to me to be competent upon the proceedings as they are now because all we have here is our admission that the co-lessees, Mr. Mapes, Jr., and Mr. Denson, would put up 20 thousand dollars to Mrs. Mapes as guaranty of good faith and then it is alleged that ten thousand dollars, one-half, was put up by Mr. Denson but the other \$10,000 was never put up and that the contract was invalid in that respect, it is just as essential to put up the other ten thousand dollars and the putting up of \$10,000 is only 50 per cent performance. On a very vital, essential and important thing like that, it is not performance in equity or at law at all, so we assign that as a breach. That would seem to be admitted at that time, that is to say, it is admitted by there being no claim that anything more than ten thousand dollars was put up, whereas the agreement was to put up twenty thousand dollars.

Objection (h) the ground is Exhibit A is not sufficiently clear or definite so as to enable a court of equity to decree specific performance. That would be difficult in this case and it looms very large and if we have an opportunity to brief this case or make oral argument, we are prepared to submit your Honor a vast number of authorities

(Testimony of P. G. Denson.)

that we believe are squarely in point on that proposition. Of course, that includes the primary thing, that the agreement, to be [160] specifically performed, must be certain, clear and definite and that primarily is conceded by the plaintiff because he alleges in his complaint that this agreement A is certain, clear, complete and definite so they anticipated that one, but their allegation, of course, does not supply the facts and we say that the facts are wholly insufficient, fatally insufficient to show a definite agreement. We pointed out some of the things in which the contract is indefinite. Objection (i) affirmatively shows that it left material terms of the proposed lease for future negotiations and hence no specific performance or any relief is available to plaintiff. I think I have covered that already. Objection (j), Exhibit A is not a contract, either at law or in equity, in that the minds of the parties never met. That goes to the very root of the whole case, as to whether or not a document such as this, which states that the parties will seek to make an agreement later on if they can, that that can constitute an agreement in law.

Mr. Sinai: May I suggest, your Honor, counsel is now rearguing his original motion for summary judgment. I know of no federal court procedure whereby he can again reargue it. He is not only in effect asking the court for an opinion of this court in respect to our sufficiency, but it sets up as his reason for coming to your Honor that no

(Testimony of P. G. Denson.)

testimony should be introduced by Mr. Denson or any other witness. It appears to me that all counsel is now presenting to the court is the [161] matter of defenses, which he is in effect arguing to the court both as law, without citing authorities, and also as fact. If we are to proceed with this case, it appears to me that the argument presented to the court is so clearly out of order, I doubt if we will ever go ahead with the case.

The Court: I might say, Mr. Sinai, it is the contention of the Court, from what I have heard so far of the objection and understanding the objection to be, to the introduction of any evidence upon this complaint on the grounds no cause of action exists and the objection covers questions of law that will have to be decided and determined in this case, and it was my thought that the ruling would be reserved on that objection. The testimony would be taken and the matter would be decided on this objection, and all other matters of the case would be decided when the case is finally submitted. That is the thought I have to take care of this situation.

Mr. Platt: I thought that was in your Honor's mind so I didn't pretend to argue the objection.

The Court: I would not want to make any ruling that would in any way be prejudicial to those questions being raised and other questions of law that go perhaps to the question of whether or not

(Testimony of P. G. Denson.)

the complaint is sufficient for a cause of action and also in support of the defenses that are set forth there, so I do not know whether I am hasty in giving my thoughts on the disposition that will be made of this objection before it is really finished, but that is the way I feel right now. So do you want to proceed with it, Mr. Cooke?

Mr. Cooke: On the further ground that the complaint does not state facts which constitute a case where any relief is designated. Objection (k) refers to the provisions in Exhibit A that approval of plans and specifications must be had before any lease on the premises shall become effective and no such approval has been had. Of course, there is no allegation in the complaint that there has been any approval of any plans or specifications signed up in writing by Mr. Denson and the defendants, and under the provisions of that clause no lease on the premises shall become effective until the approval has been had. On the further ground, objection (l), that the exhibit is unenforceable as to specific performance, in that mutuality of obligation and remedy is wanting and defendants could not compel plaintiff to operate or manage said hotel. I would say the basis for that is the general tone and character of the lease, I mean the agreement, as of September 24, 1945, as to [163] the provision of the rentals, the percentage of the rentals that should go to the lessors for payment of rent. As I said earlier in the proceedings, as

(Testimony of P. G. Denson.)

a protection to the lessors, an accounting for those rentals must be honestly and accurately done and to that end there was a personal obligation on the part of the lessees and hence the case is one where specific performance could not be decreed against Mr. Denson, for instance, and if a specific performance could not be decreed against him, then by the same token it cannot be decreed in his favor. That is as we see it under the law. In other words, Mrs. Mapes couldn't bring a suit here and set up this same document and ask your Honor that Mr. Denson proceed to take charge of the hotel as soon as it is finished and operate and render accounts, because Mr. Denson could say, verified by a thousand cases, that no such relief could possibly be had, because it involved his personal services; the Court had no power to compel anybody to perform personal services because we couldn't compel him by specific performance to perform his part of this alleged agreement, he has no standing to compel us to perform our part.

The Court: The objection to the introduction of evidence on the ground the complaint does not state facts sufficient to constitute a cause of action, the ruling on that objection will be reserved and the plaintiff may proceed with the [164] testimony and evidence.

Q. Will you please state your full name?

A. Peter G. Denson.

Q. And you are the plaintiff in the action?

A. I am.

(Testimony of P. G. Denson.)

Q. Where do you reside?

A. At the present time at the Sir Francis Drake Hotel in San Francisco, California.

Q. How long have you resided in California?

A. I have been there since March 4th or 5th of this year.

Q. How long have you resided in California, in the State of California?

A. Since 1908.

Q. What is your business or profession or occupation?

A. Hotel operator.

Q. How long have you been engaged in that profession or occupation?

A. I have been operating since 1924.

Q. Prior to that time what was your profession or occupation?

A. I was civil engineer with Ford, Bacon & Davis, Engineers, New York, address 39 Broadway at the present time.

Q. Have you used that engineering experience and knowledge in your hotel operations?

A. I have.

Q. Did you have engineering experience in the first World War? [165]

A. I did.

Q. In what capacity?

A. I was a captain in the Engineering Corps.

Q. That continued during—

A. (Interrupting): From the time I was in the service.

Q. What has been the nature and extent of your hotel operations?

(Testimony of P. G. Denson.)

Mr. Cooke: If the Court please, may I interpose an objection to the testimony sought to be elicited by this question and this type of question on the ground it is irrelevant and immaterial as to what Mr. Denson's experience has been, whether he was a capable hotel man or otherwise. The thing that we have to do with here is an agreement. He made an agreement with the defendants. There is no attack made on him as to his competency and it seems to me any time taken up proving his experience, etc., would be of no help to the Court. We object to it.

The Court: Objection will be overruled.

Q. You may answer the question.

A. I have had many hotels that I have owned and operated.

Q. What are they?

A. I have operated the Senator Hotel in San Francisco, the Governor's Hotel in San Francisco. Those are the new hotels that were built for me. After that I built the Hotel Tioga at Merced, California. After that—I was there for a period [166] of one year operating the hotel—the next hotel I had after that was the hotel in Dunsmuir and the Hotel Medford in Medford, Oregon.

Q. What was your affiliation with the hotel at Medford, Oregon?

Mr. Cooke: The same objection, your Honor, goes to all this type of evidence, without repeating.

The Court: Yes, that is understood.

Mr. Cooke: The same ruling?

The Court: Same ruling.

(Testimony of P. G. Denson.)

Mr. Cooke: We have a stipulation that exception will be made to all rulings.

The Court: I think so. I think under the rules it is not necessary to take exceptions.

Mr. Platt: I think that is the rule now, your Honor.

The Court: However, we will permit it to be taken.

(Last question read.)

A. I was a lessee there and operator.

Q. What was the condition of the hotel when you took hold of it?

A. The hotel was losing money, a thousand to two thousand a month when I took it over. The month before I took it over it lost some \$1900.

Q. What was its condition when you left it?

A. It was paying very well.

Q. Are you acquainted with the defendants in the action? [167]

A. I am.

Q. When did you first meet the defendant, Irene Gladys Mapes?

A. Either in the month of February or the month of March, 1940.

Q. That was upwards of six years ago?

A. That is six years ago, yes, sir.

Q. And when or where did you meet her?

A. I met Mrs. Mapes at her residence here in Reno. I think it is 509 Ralston Street.

Q. Upon that visit were you accompanied by any one else?

(Testimony of P. G. Denson.)

A. I was. There was another gentleman with me.

Q. Did you engage in conversation with Mrs. Mapes?

A. I did. It was in the evening when I first met Mrs. Mapes and I made an appointment for the next morning and I took Leon Hutchins out with me and we discussed building of building in some city.

Q. Who was Mr. Leon Hutchins?

A. He was the owner and manager and director of the Sir Francis Drake Hotel at San Francisco. That is, he had been until a few months previously to that, for some eight years.

Q. Can you recall about what was said at that conversation?

A. We discussed with Mrs. Mapes in regard to building of the hotel on the present land and she assured me she wanted to build a hotel and I proposed that I should interview an architect and have plans and preliminary lay-outs of the hotel [168] building that she had in mind and this I did.

Q. About how long did you spend in her company that morning?

Mr. Cooke: If the Court please, we object to this as irrelevant and immaterial. Occurring as it does prior to the making of the document that is involved here under the Court's consideration, that it is irrelevant and immaterial. If it is anything at all, it would be preliminary negotiations and the rule is preliminary negotiations are not admissible in evidence because the written document is supposed to

(Testimony of P. G. Denson.)

merge all those negotiations and all the Court has to do is to turn to the written document. There would be nothing in this case here, or at all as to testimony as to what appeared six years before any written agreement was arrived at.

The Court: What is your theory, Mr. Platt?

Mr. Platt: Well, if your Honor please, this, of course, as your Honor knows, is a suit in equity and the evidence of Mr. Denson has been categorically denied in the Answer. Our theory is that for a long series of negotiations, beginning almost six years ago, Mr. Denson was led to the belief that he, with Charles, would ultimately get a lease on the hotel. These negotiations began six years ago, that they continued with some interruption during the war, and that they were resumed again in 1944, that confidence was reposed in Mr. Denson and by word, act and conduct, as we pleaded, he was led to believe that he would ultimately get the lease and that his [169] efficiency, experience and ability would be relied upon in the construction of the hotel, in suggestions as to plans for the hotel, all based upon his experience, and we desire to show these continued words, acts and conduct on the part of the defendants, in order to establish by the evidence that he was justified in relying in good faith that they, in good faith, would grant him a lease.

The Court: I think that that portion of the question, or the answer to the question, that deals with his qualifications is material, but I can't see

(Testimony of P. G. Denson.)

how we should consider matters of negotiations that occurred prior to the going into the contract.

Mr. Platt: Before your Honor rules upon it, there is another matter to which I desire to call your Honor's attention and I consider it a very essential and important matter. It is denied here that there was a meeting of the minds at the time this contract was entered into. We desire to prove and establish, by a long series of conversations, a meeting of the minds and an understanding between Mr. Denson and Mrs. Mapes as to what they were to agree upon as to the material and essential allegations of this lease. This question of the meeting of the minds, even though the record is clear, it is one of the few admissions that have been made in this case by the defendants, even though the record is clear [170] that they all executed this contract, yet they deny, and Mr. Cooke a few moments ago insisted upon it, they deny a meeting of the minds upon the matters and things that went into that contract. We desire to prove by oral evidence that there was a meeting of the minds, that they understand the condition perfectly.

The Court: The ruling will be that matters of negotiation prior to the execution of the contract be excluded, and any questions in regard to Mr. Denson's qualifications will be admitted.

Q. When after this first visit, Mr. Denson, did you again meet with Mrs. Mapes?

A. Do you mean again after the time that I just mentioned in 1940?

(Testimony of P. G. Denson.)

Q. Yes.

A. I would say, the best I can remember, is either February or—April or May of 1944, somewhere the latter part of the spring.

Q. And where did you meet with her at that time?

A. I went out to Mrs. Mapes' home.

Q. Was there any one else present except you and Mrs. Mapes?

A. Well, the best I can remember, Gloria was there. I don't know whether she was in the room while Mrs. Mapes and I visited or not. I can't be positive about that.

Q. Did you at that time bring any one else with you? [171]

A. No, I was alone.

Q. What generally did you discuss on that occasion.

Mr. Cooke: We object on the same grounds as in the previous objection, irrelevant and immaterial, any event brought out being violation of the statute of authorities, preliminary negotiations are merged in the document as of September 24, 1945.

Mr. Platt: Well, if your Honor please, in connection with that objection, I desire to show through a long series of negotiations and conferences that there was a waiver upon the part of Mrs. Mapes and all other defendants as to the time element, that pursuant to these long negotiations they are estopped from enforcing the time element provisions of this contract. I also desire to show that

(Testimony of P. G. Denson.)

through a long series of negotiations that Mr. Denson indulged in what is known in equity as part performance of his obligations, that they recognized that he was part-performing, they recognized that they did waive the time element, and through a long series of negotiations and conferences they waived the time element and were estopped and we plead that expressly.

The Court: Matters occurring after the execution of the contract——

Mr. Platt (Interrupting): Our theory is, if the Court please, that it is tied in with negotiations and understandings before the contract. [172]

The Court: The Court is asked to order specific performance on this contract. I can't see what you have to do with matters that happened prior to the execution of the contract. Objection will be sustained.

Q. When, if again, did you visit Mrs. Mapes after, what was it, March of 1944?

A. February or March—no, April or May of 1944, the best I can remember. The records could be gotten from the register at the hotel to show the exact date.

Q. When did you visit with her again?

A. September, 1944.

Q. And were you alone at that time?

A. I called on Mrs. Mapes, that is, when I first met Charles, the best I remember, that I met Charles.

(Testimony of P. G. Denson.)

Q. Was there any discussion at that time as to whether Charles was to be associated with you in the lease?

A. Mrs. Mapes and I discussed it.

Q. What was said by you and Mrs. Mapes?

Mr. Cooke: Objected to as irrelevant and immaterial and for all the reasons urged in the preceding objections.

The Court: Same ruling, objection sustained.

Mr. Platt: But your Honor, please, in connection with that we have alleged it was at Mrs. Mapes' insistence and request that Charles Mapes be associated with Mr. Denson and [173] they have denied that. Of course we feel that we ought to be allowed to establish the allegations of our complaint.

The Court: I recollect that allegation. The ruling will be vacated and objection overruled in regard to that question.

Q. What was said between you and Mrs. Mapes with respect to Charles' association with you as a lessee?

A. Can I bring in in regard to my first word about Charles—well, the desire to have Charles associated in the operation of the lease.

Q. You mean that suggestion was made to you by some one else?

A. It was made to me by Mr. Moorehead.

Q. Who is Mr. Moorehead?

A. Mr. T. P. Moorehead is the builder that is building the hotel at the present time. I don't know exactly what the set-up is. I think they called

(Testimony of P. G. Denson.)

T. P. Moorehead Construction Company. I am not familiar with just exactly the arrangement Mr. Moorehead has with them at all, but I know he is superintendent and has had the plans and has produced the architect and the mechanical engineer and all of the drawings that have been furnished and designed and gotten out have been done by Mr. Moorehead and his associates.

Q. Do you know who suggested Mr. Moorehead?

A. I proposed Mr. Moorehead.

Q. To Mrs. Mapes? [174] A. Yes.

Q. When did you do that?

A. That was in 1944. That was before September.

Q. Well, did Mr. Moorehead represent to you that Mrs. Mapes had asked him to tell you about her desire to have Charles associated with you?

A. I wouldn't say——

Mr. Cooke (Interrupting): Just a moment. I object to that as leading, irrelevant and immaterial and calls for hearsay.

The Court: Objection sustained.

Q. What did Mrs. Moorehead say to you?

Mr. Cooke: Same objection.

The Court: Same ruling.

Q. Had Mr. Moorehead at that time been engaged as an architect or a builder for the hotel?

A. He didn't have his contract but he had been asked—anyway, he was getting out drawings. He had visited Mrs. Mapes and he was getting out preliminary drawings.

(Testimony of P. G. Denson.)

Q. Well, I understood you to state that in this conversation you had with Mrs. Mapes in 1944, I think you said in August, 1944?

A. September, 1944.

Q. You discussed the question of Charles being associated with you? [175]

A. We did.

Q. What was said by Mrs. Mapes and what was said by you?

Mr. Cooke: May our same objection go to that preliminary negotiation?

The Court: Overruled.

Q. Would you answer the question?

A. Mrs. Mapes and I had discussed Charles and I informed her that Mr. Moorehead had spoken to me about it and I had told Mr. Moorehead it was quite all right with me, I would be willing to have Charles associated with me in the deal, and Charles was coming in that evening by plane and I was visiting—that afternoon or evening, I forget just what time it was—but Mrs. Mapes asked me to wait and meet Charles, so I did, and then Charles and I visited together the next day.

Q. And was there a discussion during the time that you visited in September concerning the hotel building?

A. Yes, we discussed the hotel. There was nothing said in regard to—nothing discussed between Charles and I about the setup of the deal with him and I at that particular time.

Q. Did you ever submit or present any plans for the construction of the hotel to Mrs. Mapes?

(Testimony of P. G. Denson.)

A. Not from 1944. Mr. Moorehead presented the plans; but Mr. Moorehead furnished me with plans and changes as they were being made right along.

Q. You knew when Mr. Moorehead furnished you with plans that [177] he had been engaged by Mrs. Mapes as builder of the hotel?

A. He didn't have his contract until November. I had my contract before that matter was——

Q. Do you know, of your own knowledge, that Mrs. Mapes knew that Mr. Moorehead was showing you plans of the hotel?

A. Oh, yes, positively, because I communicated with Mrs. Mapes in regard to the size of the rooms and also made changes. Many things in the plans that I objected to.

Q. When did these communications take place with Mrs. Mapes and in what manner?

A. Mrs. Mapes phoned me on the 9th of August, 1945, in Visalia, in California, and said, "Let's get together, Mr. Denson, now and start this hotel and get ready and let's make an appointment. You can either come to Reno or I will meet you in San Francisco." I thought it was best to meet in San Francisco and I suggested San Francisco. She said that would be all right and I told her to set the date. She said any time would be convenient. I said, "Any time that would be convenient for you," and I am positive that we set the date for the 15th of August. I asked Mrs. Mapes if I should phone to Mr. Moorehead and have him over there and she said, "By all means." This I did. I phoned

(Testimony of P. G. Denson.)

Mr. Moorehead, I think my record shows that his phone number is York 6430, in Los Angeles. I requested Mr. Moorehead to phone Mrs. Mapes back to satisfy himself that that was her wishes. If I remember correctly, Mr. [178] Moorehead phoned me back and said he had phoned Mrs. Mapes who would meet us there.

Q. Did Mrs. Mapes later meet you in San Francisco?

A. Yes, Mrs. Mapes arrived in San Francisco, if I remember correctly, and I think the records show that, on the 14th of August. I think that was the day the Japanese surrendered. I was in the lobby of the Sir Francis Drake Hotel in San Francisco.

Q. Was there any one with her?

A. She and Gloria came in together.

Q. Gloria is her daughter?

A. Her daughter.

Q. One of the defendants here? A. Yes.

Q. And where did you actually meet?

A. We met in the lobby there. I didn't know just when Mrs. Mapes was coming in. I had an idea she would be in some time and there was some mix-up about the reservation that Charles had taken care of.

Mr. Cooke: The question is, where was the meeting?

A. At the Sir Francis Drake Hotel.

Q. What room or apartment?

A. We first met in the lobby.

Q. Who were present at that meeting?

(Testimony of P. G. Denson.)

A. I think that Mrs. Denson was in the lobby when they came [179] in. I am not just positive whether she was in the lobby or not, but I met with Mrs. Mapes and then there was some mix-up in regard to the reservations but one of the assistant managers assured me——

Q. (Interrupting): All right. Where did you actually meet with Mrs. Mapes?

A. This particular date was right in the lobby of the Sir Francis Drake Hotel on the 14th when we arrived.

Q. I asked you, Mr. Denson, who was present at that meeting outside of Mrs. Mapes and Gloria?

A. I think Mrs. Denson was in the lobby but I wouldn't be positive.

Q. Where did you meet, in any apartment or room?

A. No, I had gone to the Senator Hotel to be sure of accommodations—there was a mix-up—so when I returned to the lobby Mrs. Mapes wasn't there and Charles came and he said, "Come on, they are all upstairs and Mrs. Denson is up there," so we went upstairs. I don't remember whether Mrs. Mapes and Gloria—Charles went up with me and if I remember correctly, I think two young boy friends of Gloria's were up there in the room, or they came in afterward, because they were there together.

Q. Was there any discussion about the hotel at that time?

A. I don't believe it was discussed at that par-

(Testimony of P. G. Denson.)

ticular time. We had an appointment for the next day to meet the next day with Mr. Moorehead on the mezzanine floor. [180]

Q. Did you meet the next day?

A. We all met the next day.

Q. On the mezzanine floor?

A. Of the Sir Francis Drake, same hotel.

Q. Who were present at that meeting?

A. Mrs. Mapes and Charles and Gloria, the daughter, Mr. Moorehead and Mr. Slocum.

Q. Who is Mr. Slocum?

A. Mr. Slocum is an architect and is the one who has designed the plans for the hotel, working under Mr. Moorehead.

Q. And what was the general discussion on that occasion?

Mr. Cooke: We wish to insist upon our objection, if your Honor please. This is admittedly long prior to the making of the Exhibit A, the document in question in this case, and that it could amount to nothing but bringing in the very negotiations which are conclusively admitted to be merged in the written agreement and therefore inadmissible as evidence what the agreement was. That so far as counsel's statement they are relying upon this by way of estoppel and waiver, etc., we say that their conduct and things occurring after the agreement was signed up on September 24, 1945, would be admissible enough, but they can't go back to things a month prior to the making of the agreement to show estoppel or waiver. There can't be a waiver of

(Testimony of P. G. Denson.)

something that doesn't exist or involve something that doesn't exist. Counsel urged as one reason for [181] the admissibility that they had alleged these things in their pleading, in their complaint. My answer to that is that allegations do not make matters material; then a lawyer could allege anything he wanted to put in and then say we allege this and therefore we have our proof. In other words, an allegation does not make it any more admissible than if not alleged.

Mr. Platt: Well, if your Honor please, we not only have alleged it, but they allege it. They have uniformly alleged that it was the understanding between the parties and that the agreement itself provided that the parties should get together upon plans and specifications for the building. Now we are trying to show the efforts that were made by Mr. Denson to get together with them on plans, those efforts having started even before the agreement was signed. It was arranged that the architect should be there, that Mr. Moorehead should be there, that they would discuss plans, and we expect to prove that he, himself, upon many occasions, before and since, has made suggestions as to plans. He was carrying out his part of the agreement and we expect to establish his part-performance beginning further back, from the time about which he is testifying now.

The Court: I will overrule the objection. You may answer the question.

(Question read.) [182]

(Testimony of P. G. Denson.)

A. The general discussions were the plans in general. Mrs. Mapes didn't approve of a good many of the proposed lay-outs that Mr. Slocum had and they were getting together on those many changes. The next day, Thursday, we all met and more changes were made later that afternoon by Mr. Slocum, the architect, and brought back the next day. The same thing took place on Friday. We all met together for more changes made and I suggested to Mrs. Mapes that this was just a matter of preliminary drawing, that we would get more details and make larger drawings that she could tell better about and so, if I recall, some time that Friday afternoon Mrs. Mapes was desirous of seeing some of the apartments in some of the hotels in San Francisco and I arranged to take them around to some of the places.

Q. When you say you arranged to take them around——

A. (Interrupting): I phoned these various managers of the different hotels like the Alexander-Hamilton on O'Farrell Street, between Leavenworth and Pine I think it is, in that neighborhood, and Mr. Tremaine, who is manager of the Tremaine Apartments, and he suggested I take and show them his apartments. We did. We went from there to the Fairmont Hotel. I hadn't phoned but due to the fact I knew the manager very well, and he had just left for his vacation, but knowing his secretary, she arranged for one of the assistant managers to show us over. Then from there we went

(Testimony of P. G. Denson.)

to the Mark-Hopkins. I phoned Mr. Rosin, one of the executives of the Mark-Hopkins— [183] he has been there since the hotel was built—and he showed us some two or three apartments.

Q. Who was with you on that trip?

Mr. Cooke: I object on the ground under no conceivable theory in the case is this evidence admissible. One reason urged for the evidence going in that we objected to, was that it was alleged, but there is no allegation about visiting hotels. We earnestly insist it can have no possible bearing on the question whether this agreement is one that your Honor can lawfully and specifically enforce.

Mr. Platt: I submit, your Honor, that a rather extraordinary position is being taken in this case. Gloria Mapes, a member of this family, knew nothing about this agreement, evidently had no knowledge of anything concerning these transactions and we are endeavoring to show, if we can——

The Court: The objection will be overruled and he may answer the question.

(Question read.)

A. Mrs. Denson was along, Mrs. Mapes, Mr. Moorehead. I can't be positive whether Gloria was or not, but I feel that she was. I think she was; I can't be positive.

Q. Do you know whether Gloria was in San Francisco on that occasion? A. Oh, yes.

Q. Do you know whether she met with you and Mrs. Mapes at any [184] other time on that visit?

(Testimony of P. G. Denson.)

A. I think the best I can remember we all had dinner together one of those evenings and I feel positive Gloria was there.

Q. When, if you remember, did you meet Mrs. Mapes again?

A. Well, I think we met very shortly after that in San Francisco again and I believe that Mrs. Mapes was staying at the Fielding Hotel and we met on the mezzanine of the Fielding Hotel and at that meeting was Mrs. Mapes, Charles, Mr. Moorehead, and I am almost positive that Mr. Slocum, the architect, I am positive he was there, Mr. Slocum was there also.

Q. What was said and done on that occasion?

A. Well, we met that morning and went over the plans in general.

Q. Who submitted the plans?

A. Mr. Slocum and Mr. Moorehead and we went over those things in general and then that was in the forenoon and then we all went to lunch and oh, I feel positive we went back to the Fielding and there was more discussion going over more of the plans. I can't be sure of that, but I am almost positive that we went back again that afternoon up to the mezzanine of the Fielding.

Q. Do you recall any other meeting with Mrs. Mapes prior to the time Mrs. Mapes and Charles signed the agreement as Exhibit A here?

A. Charles and I came to Reno on Friday aft-

(Testimony of P. G. Denson.)

ernoon. I think [185] that was September 21st, and stayed there Friday evening and Saturday evening and left there about six o'clock on Sunday, the 23rd.

Q. And did you visit at Mrs. Mapes' home on that occasion?

A. We did. Charles had phoned to me at Visalia, phoned to come over and meet the attorney for Mrs. Mapes and we had already discussed what the percentages were and the percentage deal had been discussed.

Q. When did you discuss the percentages?

A. Well, Mr. Moorehead—I had given Mr. Moorehead what the deal would be and Mr. Moorehead, I think, had taken that up with Mrs. Mapes—I am not positive—but any way, when we had this meeting in San Francisco, that was August, between the 15th and 18th, Charles and I got together. Charles wanted to see me and I made an appointment to meet him on the mezzanine floor and he informed me he wanted to be 50-50 on this deal of leasing of the hotel and everything about it. I told him that was all right, but I would make a little request—that I wasn't looking for any publicity, it wouldn't even show on our letterheads or stationery or anything of the hotel forms—but I would like to have the management of the operation for a specified time, due to the fact that he was inexperienced. I thought we ought to have a little agreement between he and I, or we didn't have to have an agreement. "Well," he said, "Mr. Denson, I

(Testimony of P. G. Denson.)
expect you to be the operator," so I had full [186] confidence in him and I felt sure that would be the way it would be. I think that was that, but that was the discussion between Charles and I.

Q. Then were you in Reno on September 25, 1945, and signed the agreement?

A. No, I was not. I left here on the night of the 23rd, Sunday. Mrs. Mapes phoned for Mr. Cooke. Charles and I and Mrs. Mapes, I tried——

Mr. Cooke: Object as not responsive to the question.

Q. Well, did you see her on the 23rd or 22nd or 21st?

A. I saw Mrs. Mapes the night of the 22nd. I was here on the 21st, that was a Friday, and I was here Saturday and, I think those are the dates. September 22nd, and I left here on the 23rd and the agreement was prepared by Mr. Cooke on the 24th and mailed to me by air mail special to the Biltmore Hotel at Los Angeles and that is where I received this contract signed by Mrs. Mapes.

Q. Did you have any conversation in September with Mrs. Mapes before you left for Los Angeles, about the contract? A. I did.

Q. When did you have that conversation?

A. We talked the night I arrived. I wanted to go back Saturday morning, but Mrs. Mapes wanted me to stay over Saturday. Then I tried to get Mrs. Mapes to get Mr. Cooke to come over and be there and I thought Mr. Cooke would be there Saturday but [187] it was Sunday afternoon at four o'clock

(Testimony of P. G. Denson.)

before I could get Mr. Cooke over there. She objected to the contract we had and objected to the way I was guaranteeing taxes and insurance and interest on borrowed money and upkeep and also amortization of the loan over the period of 20 years. So after Mr. Cooke came——

Q. (Interrupting): Now who sent for Mr. Cooke?

A. Mrs. Mapes or Charles, I can't remember just which one.

Q. When did Mr. Cooke arrive?

A. About four o'clock in the afternoon.

Q. On Sunday? A. On Sunday.

Q. What was said by you and Mr. Cooke and Mrs. Mapes? A. I explained to——

Mr. Cooke (Interrupting): We object and wish the objection to apply to those preliminary negotiations and discussions and talk and conclusively presumed all matters merged in the written document admittedly signed as a result of these preliminary discussions and negotiations, and I add my other objections I made to the admissibility of the same offers of testimony in regard to things that occurred prior to the making of the instrument.

Mr. Platt: I submit, if the Court please, the answer in this case has denied a meeting of the minds upon this contract when it was entered into. If they will admit the [188] meeting of the minds of the material and essential things in this contract, I won't ask Mr. Denson these questions.

(Testimony of P. G. Denson.)

The Court: Objection overruled.

A. The objection to the contract, as I stated, was due to the fact it mentioned the income from the building. Mrs. Mapes says, "You have nothing to do with the stores and let's leave all of that out of the contract. Just make it a straight percentage as to what it calls for and never mind about the insurance, taxes and all of those other things and amortizing the loan." I finally got Mrs. Mapes to send for Mr. Cooke. He arrived. I explained what it was and that made it better and show whoever was making the loan that the loan would be secured, that we were putting our furniture in and giving a first chattel mortgage to secure the faithful performance of the lease or agreement we were making, and I instructed Mr. Cooke to redraft it and to please Mrs. Mapes to leave that out, but it was to her advantage and interest and protection it should be there. He was to redraft it and to leave this out and they agreed to redraft that on Monday and get it to Los Angeles in order that I could go and try to negotiate a loan. This they did. I received it and my envelope will show it. about 10:10 the morning of the 25th. After looking it over, I discovered that they had put all that in there that they were supposed to leave out but had left out the stores. I phoned Mrs. Mapes and she wanted to know if I received the [189] contract and I told her I had but it was not drawn the way that they intended to draw it, that they had inserted the clauses that they objected to but she failed to put

(Testimony of P. G. Denson.)

the matter in there complete and I informed her I would have to have the stores in there and she informed me that it would include everything. I informed her I would insert it and type it in and we could initial it when I came back over and that I did and it was initialed when I arrived back on the 4th and when I made the deposit on the 4th, put up my check, it was initialed by Mrs. Mapes, signed by Mrs. Mapes, initialed by Charles, signed by Charles and myself and witnessed by Mr. Cooke and also his secretary in his office.

Q. During all of these negotiations and at the time of this last conversation, you were not represented by any attorney, were you?

A. No, I was not represented by an attorney.

Q. So you left Reno and you gave instructions to send the contract to you and you informed Mrs. Mapes that you were making this interlineation and then what did you do? Did you sign the contract in Los Angeles or did you come back to Reno?

A. I came back to Reno on the 3rd of October.

Q. 1945?

A. 1945. I think that Charles met me at the depot and drove me out to the house. I know he met me on one occasion and I think that was the time he met me, the night of the 3rd of [190] October, and drove me out to the house.

Q. When did you sign the contract?

A. I signed the contract on the 4th of October when I made the deposit, when Charles——

(Testimony of P. G. Denson.)

Q. (Interrupting): Wait a minute. I didn't ask you about the deposit. I asked you when you signed the contract?

A. The 4th of October, 1945.

Q. Where did you sign it?

A. In Mr. Cooke's office.

Q. After signing the contract, what else did you do with respect to the contract?

A. I made the ten thousand dollars deposit to them and they gave me a receipt for it and after that was done I informed Mr. Cooke the next thing to do was to prepare the lease and any time you are ready, I will sign it."

Q. And who was present when you signed the contract and paid this check and made this statement about being ready to sign the lease?

A. Mrs. Mapes was present, Charles was present, Mr. Cooke was present, and I was there. I can't say whether his secretary was in the room or not, but she was just outside.

Q. Have you that cancelled check?

A. I have.

Q. I wish you would produce it. If you have the receipt, you might produce that, too. [191]

The Court: This might be a good time to take a short recess.

(10 minute recess taken at 3:30.)

Q. Mr. Denson, when you made the suggestion to Mr. Cooke and Mrs. Mapes about this interlineation in the agreement, I wish you would clarify that

(Testimony of P. G. Denson.)

suggestion. Did you mean by that that you wanted the stores included in the lease?

A. Oh, no, no, no. I wanted to show that her total income from the entire building would be sufficient to amortize her loan over the period of the 20 years.

Q. That was because you were obligated under the contract to pay her sufficient rental so that she could amortize the loan within the life of the lease?

A. That is correct.

Q. Now I asked you before the recess to produce the check which you gave to Mrs. Mapes, as I understand it, when you signed the contract. We offer it in evidence.

Mr. Cooke: We object to the admission in evidence of the offer on the ground it is irrelevant and immaterial. It is alleged that the offer was made and it is admitted that it was made. There is no issue in regard to the ten thousand dollars being paid. I do not see any use in encumbering the record with anything further upon it.

Mr. Platt: There is another extraordinary statement here in the pleading and in the answer that this payment was [192] not made contemporaneously with the signing of the agreement.

The Court: Objection is overruled and the check may be admitted in evidence as Plaintiff's Exhibit A.

Mr. Platt: May we have the privilege, your Honor, if it is desired, to substitute a certified copy?

(Testimony of P. G. Denson.)

The Court: It may be withdrawn on substitution of certified copy.

Q. Now, Mr. Denson, after you delivered that check you received a receipt, did you, for the payment of it? A. I did.

Q. Are you acquainted with the signature of Irene Gladys Mapes? A. I am.

Q. Did you see her sign that? A. I did.

Mr. Platt: We offer it in evidence.

Mr. Cooke: We object, if the Court please, on the ground that the payment of the ten thousand dollars is alleged and admitted two or three times in the pleadings. There is no issue about it. The agreement is dated September 24, 1945, and we allege the payment was made on October 4th, so there is no issue as to that. It is simply encumbering the record with non-essential, immaterial matter.

The Court: Objection overruled. Admitted as Plaintiff's Exhibit B. [193]

Mr. Platt: May we have the same privilege of withdrawal?

The Court: It may be withdrawn upon substitution of copy.

Q. Have you in your possession, Mr. Denson, the agreement of September 24, 1945, signed by all of the parties to it? A. I have.

Q. Will you produce it? Is this your signature on this agreement? A. It is, yes, sir.

Q. Do you recognize the signatures of the other parties to the agreement?

(Testimony of P. G. Denson.)

A. Yes, those are the signatures of all the parties.

Q. Are you familiar with their signatures?

A. I am, yes.

Q. State whether or not this agreement was signed before or after you delivered the check?

A. That particular document you hold there was signed the day that I gave the check, on the 4th of October.

Q. And upon the same occasion, at the same meeting?

A. At the same meeting of all parties whose signatures are there.

Q. At the same time you delivered the check?

A. That is correct.

Mr. Platt: We offer it in evidence. [194]

Mr. Cooke: Same objection, your Honor. It is pleaded and admitted on both sides.

The Court: Same ruling. Admitted as Plaintiff's Exhibit C and may be withdrawn on substitution of certified copy.

Q. Did you remain in Reno after this transaction was completed?

A. I left by plane some time after that that afternoon.

Q. And to what place did you go?

A. I took the plane as far as Fresno and then I had some one meet me with a car to drive me to Visalia.

Q. Your home? A. Yes.

Q. Subsequent to the signing of that agreement

(Testimony of P. G. Denson.)

did you make any effort to carry out your obligations of it, or some of them, toward providing adequate and suitable furniture and equipment and accessories for the furnishing of the hotel?

A. I began to contact different firms.

Q. What were the names of the firms?

Mr. Cooke: We object to this evidence and all this type of evidence as foreshadowed by the amended complaint as to what plaintiff tried to do in getting ready to carry out his part of the contract, as irrelevant and immaterial, the specific grounds being that it does not constitute any part performance because there is no provision in the written agreement or document and nothing in any oral agreement arrangement [195] pleaded calling upon him to make any arrangements or to change any of the things mentioned in the pleadings and which he is now apparently testifying about. There is considerable alleged that he called Mrs. Mapes on the phone at that time and Charles Mapes on the phone another time and they called him and he saw the Barkers about furniture, but that is not any part of the provisions, your Honor, because there is nothing in the agreement or oral talk subsequent to signing of the agreement that called upon him to make any arrangements at all and therefore it seems to me it is irrelevant and immaterial. He wasn't, in any event, authorized to go ahead alone. If there is any agreement there, it is an agreement between Mrs. Mapes on the one hand and he and Charles Mapes on the other hand and his individual

(Testimony of P. G. Denson.)

personal acts, not associated with or participated in by Mr. Charles W. Mapes would not be anything called for by the agreement. It would be just his voluntary action and it is nothing that constitutes any provision of the thing, because it is not claimed it was required of him to do any of those things. That is the law of part performance, have an oral agreement that the parties do certain things and then he goes and does those certain things, that would constitute part performance, but for him to go out and do certain things upon this reliance upon an agreement does not constitute part performance. The most he can claim is that he relied upon this Exhibit C, the agreement of September [196] 24th, as being in force and that he was getting ready to carry out his part and thereby to hold Mrs. Mapes obligated upon the thing as to the changed conditions. This matter here, your Honor, goes to the question of whether Mrs. Mapes is estopped by reason of what he did and whether she waived the right to insist upon the time element by reason of what he did, but all of that has got to be with reference to something that is required by an oral agreement. He might go out voluntarily and go on a fishing trip and say this is in pursuance of the agreement and because Mrs. Mapes knew of it, it therefore changed the agreement. I am using an extreme illustration, of course, but I think it expresses what I am getting at, that it was only as to matters agreed upon. If he could show he had talked with Mrs. Mapes and it was agreed he was to do so and so, interview

(Testimony of P. G. Denson.)

Barkers, buy furniture and select the color and get ready for this business and then he offers to show upon this trial that, relying upon that oral arrangement he had with Mrs. Mapes that he should buy furniture and get this stuff, he is carrying out, he is performing the things that she agreed he was to perform, but here there is no allegation that he was to perform any of these things that are set up in the complaint and which he now proposes to testify to. It is a voluntary matter altogether and because she knew of it does not make a bit of difference. She is not compelled to run after him and tell him to stop doing this thing. [197] That does not make it admissible, does not make it part of the contract, does not constitute part performance or whole, does not constitute anything. Mrs. Mapes was under no conditions or obligations to hold him back, if he wanted to show progress, but we should all keep this in mind, here is an agreement, if it is anything at all, between Mrs. Mapes on one side and Mr. Denson and Charles W. Mapes on the other. Now for Mr. Denson to say that he went out on his own account and undertook, by his own individual action, without regard to his co-defendant Mapes, who had just as much to say about it as he did, that he could do anything of that kind is presumption to say the least. Co-tenants haven't any authority of that sort and under the allegation of partnership existing between those two men, why one partner can bind the other. Charles W. Mapes could have gone out and discussed the matter of furniture with some other

(Testimony of P. G. Denson.)

firm and Mr. Denson with the Barker Company but you cannot effect a change in a written document by individual independent action of these co-tenants. He here claims his own individual act constitutes a change. He does not pretend that Charles W. Mapes participated, does not pretend it was joint action of the two of them, he went and did this thing, interviewed Barkers and Dohrmann's, etc., and then he says that constitutes estoppel and waiver on the part of Mrs. Mapes to claim the time element. Authorities are uniform that things done merely on reliance of agreement [198] does not constitute part performance, only those cases where there has been some oral agreement, where that oral agreement is performed in whole or in part, that there is any part performance.

The Court: Mr. Platt, what is——

Mr. Platt: Your Honor please, as I listened to Mr. Cooke I was wondering why he advised his client to sign a written agreement or why he made Mrs. Mapes take ten thousand dollars of this man's money upon the signing of an agreement. To hear counsel talk, you would think that the agreement was not worth the paper it is written on. I submit to your Honor that that agreement is a solemn document, it calls for the performance of certain things upon the part of all the parties to it and it called for the payment by Mr. Denson of the substantial amount of ten thousand dollars, which Mr. Cooke's client accepted. Now that solemn document provides that Mr. Denson and Mr. Charles Mapes are to

(Testimony of P. G. Denson.)

furnish that hotel suitably. The agreement not only provides that, but it provides that they are to give Mrs. Mapes a chattel mortgage on that furniture as security for the payments of the rents as indicated in the agreement, and in accordance with that solemn obligation of Mr. Denson's—he treats it far more solemnly than Mr. Cooke does—in accordance with that solemn obligation, he goes out to perform and he interviews these people. We expect to furnish the hotel, to get plans for it, to get equipment for it, and we expect [199] to prove beyond a doubt that his efforts in that respect were communicated to his co-lessee or co-tenant, Charles W. Mapes and that Charles W. Mapes was familiar with everything he did in that respect. And we submit, if the Court please, that we can't see how testimony of part performance, specifically under an agreement which requires a party to furnish a hotel and to get the furniture, put it in there and give a mortgage on it, that it isn't part performance if he goes out to get it. There isn't any law in the land that is opposed to that doctrine. We expect to show by this witness, and by other witnesses, that the defendant, Charles Mapes, knew all about that. He was present and saw the plans and everything and discussed the matter with the representative of Barker Bros.

Mr. Cooke: May it please the Court, it does not seem to me that counsel has met the real issue of the objection. What I was trying to argue was what constitutes part performance in the first place

(Testimony of P. G. Denson.)

and that wouldn't consist of the independent individual acts of one of the two parties, such as supposed to be shown here.

Mr. Platt: Mr. Cooke, may I interrupt by asking a question?

Mr. Cooke: Yes.

Mr. Platt: Wasn't Mr. Denson as much obligated to assist in the furnishing of that hotel as Mr. Mapes, and wasn't [200] he carrying out the conditions of that agreement by laying the foundation for furnishing it?

Mr. Cooke: No. No, the agreement does not call for anything of that kind. It calls for putting in this furniture, but countering your question, Mr. Mapes has just as much to say about it as Mr. Denson and so far it isn't shown or offered, except by your statement just now, that Mr. Mapes knew anything about it or participated in it, but as to the statement that I seem to have a very slight regard or appreciation for what he called a solemn document, I want to say that he seems to have a spell of forgetfulness when he says that the document calls for ten thousand dollars from Mr. Denson. The document does not call for any ten thousand dollars from Mr. Denson at all, it calls for twenty thousand dollars from these two people and there was only ten thousand dollars put up and for the purpose of this case it does not matter whether it was put up by Mr. Denson or by Charles Mapes, it wasn't compliance with the agreement in any event,

(Testimony of P. G. Denson.)

but when he says he put up this ten thousand dollars and furnishes this receipt and check as to that, that presupposes conclusively, the fact is it shows there was a default on the part of Denson, he never complied with the agreement in regard to the amount, that is to furnish twenty thousand dollars, and if the co-tenant did not come through with his share, that is up to him, not up to Mrs. Mapes. I still insist upon the proposition, if the Court [201] please, that this does not show any part performance, that there is nothing in the agreement that calls upon him to do these things that he alleges he did do and therefore it is without the rule of part performance and is immaterial and irrelevant.

The Court: The objection is overruled. You may answer the question.

(Question read.)

A. Dohrmann Supply Company of San Francisco. They are on Mission between 5th and 6th Streets; Magnam-Holbrook & Elkus; D. & F., San Francisco; Barker Bros. of Los Angeles, the hotel department, and Sloane, W. A. Sloane of San Francisco.

Mr. Cooke: As to W. A. Sloane & Company, we object to that upon the ground that it is not pleaded in the amended complaint as one of the things that plaintiff did as part performance.

The Court: I do not believe that they be confined just to the names mentioned in the complaint. Objection will be overruled.

(Testimony of P. G. Denson.)

A. Well, W. A. Sloane didn't furnish me any plans anyway.

Q. But you consulted with them?

A. I did, yes.

Q. With respect to certain of the furnishings of the hotel?

A. Oh, yes yes. Am I allowed to tell something about those interviews as regards to Charles, my associate? [202]

Q. Well, I am not asking you outside of the presence of any one of these defendants about what was said to representatives of Sloane or Barker Brothers or Dohrmann or anybody else, but I am asking you this question, that subsequent to your interviews and arrangements, tentative or otherwise, with these firms about whom you have testified, did you later meet with the defendant, Charles Mapes, concerning your interviews with these various firms?

A. I did.

Q. And when and where did that meeting occur and how was it brought about?

A. Charles phoned me—I was in Los Angeles practically finishing up my deal of the sale of my hotel that I was disposing of—phoned me in Los Angeles and the best I can remember it was either the night of the 26th or the morning of the 27th of December, 1945, and was very desirous of meeting me in San Francisco to go over some changes, to meet him in Mr. Moorehead's office, that is in Oakland, in the Crenshaw Building there, anyway

(Testimony of P. G. Denson.)

Mr. Moorehead's office in Oakland, the builder's office, and I informed Charles yes, and I told him I could meet him any time he wanted me to. I drove back to Visalia that night and it was on the 28th I think—the record will show that, the register of the Lempton Hotel——

Q. Registration by whom?

A. Charles registered in there the day before I registered in [203] there on the morning of the 28th. I left Visalia at five o'clock in the morning in order to be there to meet him about 9:00 or 9:30 in Mr. Moorehead's office.

Q. When?

A. The 28th of December, 1945.

Q. All right. Did you meet him?

A. I met him in Mr. Moorehead's office.

Q. And who were present at that meeting?

A. Mr. Moorehead was there and I feel positive that Mr. Slocum was there, also the office crew in the drafting room.

Q. And who else?

A. Well, I can't remember just the names of them. Mr. Day is one of the architects there, and the mechanical engineer, I just forget his name.

Q. What conversation ensued upon that occasion in the presence of the defendant, Charles W. Mapes, Jr.?

A. We discussed the plans and we went over the plans, due to the fact that there was some of the things that I was asking for, and we had discussed——

(Testimony of P. G. Denson.)

Q. (Interrupting): You mean the plans of the hotel?

A. Plans of the hotel, yes. In fact, we didn't discuss any other plans at that particular meeting excepting the hotel.

Q. All right. What was said?

A. Well, we went into the rooms, the closet space, the mezzanine floor, the basement and also the sky room and size of the [204] check rooms.

Q. Well, did you make any suggestions of change of plans?

A. I made suggestions right along from the 31st of August of 1945. Mr. Moorehead brought the plans to Visalia to show me. We sat there for two or three hours going over the plans that he had submitted to me.

Q. When you discussed changes of plans in Mr. Moorehead's office on December 28, 1945, in the presence of Charles W. Mapes, Jr.—

A. (Interrupting): I did.

Q. (Continuing): —did Mr. Moorehead submit to you plans of the hotel that he had prepared?

A. Oh, yes.

Q. Well, did Charles W. Mapes participate with you in the examination of these plans?

A. He did.

Q. And discussion of them?

A. That's right.

Q. Do you know as a matter of your own knowledge, that your suggestions were ultimately approved?

(Testimony of P. G. Denson.)

A. Well, I feel sure that the suggestions and the recommendations that I made in regard to certain changes, that they were all adopted. Even right up to the first day of April of this year.

Q. Now, did you ever have any meeting at which the defendant, [205] Charles W. Mapes, was present with respect to plans and specifications for furnishing the hotel?

A. The first time that Charles——

Mr. Cooke: The question is, did you have such meeting, not what took place.

(Question read.)

A. For furnishing the hotel?

Q. Answer yes or no. A. Yes.

Q. And when and where did that meeting occur?

A. In Mr. Moorehead's office April 1, 1946, of this year.

Q. Do you recall who were present at that meeting?

A. Mr. T. P. Moorehead, the builder; Mr. Slocum, the architect, and Mr. Hart, Charles' uncle; Mrs. Mapes' brother. I think Mr. Hart was from New York, contracting; Miss Ruth Mason, the interior designer of Barker Bros. of Los Angeles, California.

Q. Anybody else?

A. The mechanical engineer was in the office, in and out from the drafting room, and myself.

Q. Well, when and how was that meeting ar-

(Testimony of P. G. Denson.)

ranged at which Charles W. Mapes, one of the defendants, was present?

A. I called Mrs. Mapes from Los Angeles on March 25th, which the record will show.

Q. 1946? [206]

A. 1946. I talked with Mrs. Mapes eight minutes on the phone.

Q. What did you say to her and what did she say to you?

A. I talked from the hotel in Los Angeles. Mrs. Mapes said she was very sorry Charles wasn't there because there was a little something he wanted to mention to me about the sky room. I said, "Mrs. Mapes, I will call Charles tomorrow." She said, "I will see that he will be here." I phoned Charles on Tuesday. I talked to Charles seven minutes. I wanted Charles to come to Los Angeles. He had agreed he would come to Los Angeles any time I wanted him to look over different lay-outs that I was having prepared by Barker Bros. Furthermore, I wanted him to bring Mr. Slocum, the architect. He agreed to pay Mr. Slocum's expenses to Los Angeles. Mr. Moorehead said he would like to also come and I told him I would be very glad to have him in Los Angeles too.

Mr. Cooke: Are you now telling what took place on March 25, 1946?

A. This is the 26th I phoned Charles, the following day. Pardon me if I am getting a little ahead of it. I phoned Charles on the 26th—

Q. May I interrupt? When you say you ar-

(Testimony of P. G. Denson.)

ranged to discuss with him the various lay-outs, what do you mean?

A. Those were plans being prepared by Barker Bros. which he knew I was having drawn up.

Q. For furnishings? [207]

A. For furnishings and everything that we were to equip the hotel with over there.

Q. All right.

A. Charles said it would be impossible for him to come down to Los Angeles, that his uncle was here from New York, that he would like to meet me in Mr. Moorehead's office. I informed Charles that would be all right, that I always told him I would go to San Francisco and meet him any time he wanted me to. I said, "When do you want me to come up?" He agreed he would either phone or wire me. He didn't mention anything about the sky room to me on the phone. So he didn't phone or wire me the next day and I think it was Friday before he phoned me—it might have been Thursday, but I think it was Friday. I told him all right. He set the date. I asked him why he didn't phone the next day and he said he had tried to get me and couldn't. So I suggested that I would bring up all of the drawings and lay-outs of designs that were prepared by Barker Bros. He said, "Well, that will be all right." I went over then to Barker Bros. in order to get the minute drawings and plans which I have with me today and the designs, lay-outs. Mr. Crawford, manager of Barker Bros.,

(Testimony of P. G. Denson.)

suggested that Miss Mason be in San Francisco at this meeting.

Q. Who is Miss Mason?

A. Miss Ruth Mason, the interior designer, she was at that time, for Barker Bros., and I thought that was rather heavy [208] expense, in fact, I remarked——

Q. Well, eliminate your own opinion.

A. Anyway she came up. I had an appointment with Charles to meet him in Mr. Moorehead's office, I think at 9:00 or 9:30 or 10:00 o'clock on a Monday morning, which was April 1st.

Q. 1946?

A. 1946. I came up on the last day of March, the 31st, on the two o'clock plane and Miss Mason, I understand, came up on the three o'clock plane. That evening Charles had left a little note in my box at the hotel.

Q. What hotel?

A. The Sir Francis Drake Hotel in San Francisco. I think the records show he had registered in there the day before I arrived—that he would see me the next morning, that they were stopping at the hotel and he would drive me over to Mr. Moorehead's office. We met the next morning, Charles and I and Mr. Hart, his uncle, Miss Mason, we met at breakfast.

Q. Where did you meet?

A. In the lobby of the Sir Francis Drake Hotel, at breakfast in the coffee shop, and Charles drove us over to Mr. Moorehead's office. That was on the

(Testimony of P. G. Denson.)

morning of April 1st of this year, and I think we arrived there around 10:00 o'clock. In his office I already stated the number of people there, who they were. I introduced Miss Mason to Mr. Moorehead and Mr. Slocum and mentioned to Mr. Moorehead that we had gone about [209] as far as we could with these various lay-outs, due to the fact that we would have to have more detailed drawings showing the heights of ceilings and size of windows. Mr. Moorehead informed me, "Mr. Denson, those plans will be ready by the 15th of this month." That was of that April. I said, "Make a notation of that, Miss Mason," and you can send Barker Bros., one copy and send me two copies, one for myself and one for Dohrmann's. We worked on the plans for the basement up through every department, going over the various changes.

Q. Did Charles W. Mapes, the defendant, participate?

A. He was right there, looked over all the drawings and various designs which I have with me. When we got to the sky room there was a change I wanted to make as to the size of it, which has been adopted and that has been used. It is much larger than what the plans I have now calls for, but in looking over the various lay-outs and designs prepared by this interior designer, this Ruth Mason of Barker Bros., Charles made the remark that he did not like to decide anything definite on the sky room, there was a little something he wanted to take up with Mr. Denson, so then it

(Testimony of P. G. Denson.)

was some 20 minutes after 12 or half past, so I suggested that he all have lunch, which we all did. After lunch, there was no hurry; we gathered up all the plans, went back to San Francisco, Charles with his uncle, Miss Mason and myself in his car. Miss Mason was taking the five o'clock plane back that afternoon. Charles went up [210] with Miss Mason to get the brief case she had with notes and prices, which had never been submitted. We didn't get that far. Charles said he would come down to my room, which he did just a few minutes after that. Charles came down and told me that there was something he wanted to talk to me about the sky room. He informed me that they had such big offers for the sky room that it was just out of our reach and we couldn't begin to compete with the offers from these gamblers that they had been offered for the sky room. I informed Charles I didn't like the idea of giving up the sky room, that we couldn't lose control of that. I said, "Just explain more thoroughly," so he started in about the cost of the building and other things in particular and I told him, "Well, Charles, our contract calls for the sky room and specifically states that and I don't want to give up the sky room." "Well," he says, "if that is the way you are going to talk, there is no use talking," and he got up and started out of the room. I persuaded him to sit down again and not lose his temper and talk things over. I informed him our contract called for the sky room. He claimed his mother was rushed into the contract.

(Testimony of P. G. Denson.)

Well, that I resent and informed him how long I had known his mother and we had been working on this particular deal since some time the early part of 1944 or middle part of 1944 right up to now. Well, he left the room and he said, "I will be back again about five o'clock and talk to you some more." I said, "All right, [211] I will be here waiting for you." So about quarter to six I had him paged. He said he was waiting for a lady friend and would phone me as soon as she arrived. I told him all right. Well at 6:15 the boy phoned. I had invited he and his girl to have dinner, be my guests that evening. He phoned me and asked me to come down to the Persian Room and have a drink. I told him all right, so I went down and went into the Persian Room and the maitre d'hotel asked me if we were going to have dinner and I said I was waiting for some one. There were only five or six people there and I didn't see Charles but saw them over in the lounge and I went over and visited with his uncle and met the girl and I suggested we have dinner at the Persian Room and Charles informed me no, they wanted a sea food dinner. I informed him any place he wanted to go was all right with me, so we went to dinner at Bernstein's, but if I remember they refused to be my guests, in fact, they took care of the check themselves, but he let Mr. Hart walk with the girl on the way to Bernstein's, wanted to talk with me more about the sky room. I said, "Charles, who are making these big offers?" He said, "They

(Testimony of P. G. Denson.)

are legitimate; they are friends of ours; in fact, the offer is big enough to take care of the cost of one-third of the building." I had very little to say on the way to Bernstein's restaurant. On the way back up he had his uncle walk with his girl again, wanted to talk to me some more. We went over to the lobby of the hotel and Charles [212] remarked to me he felt sure if I would come on over to Reno that he and his mother and I could get together and arrange things satisfactorily, due to the fact that he have all of the hotel and the cocktail lounge and casino part downstairs. I told him we had a contract with Mrs. Mapes and it would be very bad to give up and try to have some one else in there, that we couldn't lose control of the sky room and our contract specifically stated it, so therefore I was going to stand on our contract. However, I shook hands with him, but I told Charles I was very much hurt and disappointed by the way he talked to me. He remarked he had already forgotten about that, he probably lost his temper and I informed Charles I didn't want it to happen again, I was going to overlook it but I didn't want any one to shove me around, that he and I were entering as partners and we must get along. I shook hands goodbye and there was no bitterness on my part at all and Charles went on in the cocktail lounge and I went to the Sir Francis Hotel and phoned Schrader, vice-president of the Wells Fargo, and went out to his house that evening.

Q. Mr. Denson, you testified that Miss Mason

(Testimony of P. G. Denson.)

submitted plans and specifications from Barker Bros.?

A. Not specifications, The specifications and prices she probably had with her, but I have never seen the specifications and prices myself from Barker Bros.

Q. She did submit plans though? [213]

A. Oh yes.

Q. Have you with you now the plans that she submitted? A. I have.

Q. I wish you would produce them.

A. That is something proposed and more or less design of picture showing the coffee shop lay-out. This design showing apartment and the rooms lay-out; set-up of furniture. As a rule we generally make little models and place them around to show the most appropriate places to place them.

Mr. Platt: We offer them in evidence.

A. There are plenty more.

Mr. Platt: We offer them as one exhibit.

A. This is drawings by Moorehead Company that Barker Bros. prepared the plans from and these plans are practically the same as the building is being built now, with the exception of the sky room which is being made larger. I have seen that plan myself but they refused to give me the drawings of it.

Q. You are referring now to plans with the legend on each one of them, each one of the six?

A. This is January 15, 1946, these were made.

Q. The legend "basement plan, hotel building

(Testimony of P. G. Denson.)

for Charles W. Mapes Company, Reno, Nevada, the Moorehead Company, P. T. Moorehead manager of design and construction and F. Harvey Slocum architect, Oakland, California" and the others are marked, "First floor plan," with the same legend, "mezzanine floor [214] plan," "room floor plan," "sky room floor plan," "Virginia Street west elevation."

A. I have a few other sets of these same plans.

Mr. Platt: I dislike to burden the record this way, but I would like to get these plans in evidence and I offer them in evidence as one exhibit.

The Court: Any objection, Mr. Cooke?

Mr. Cooke: I think I will. I know I have some. I will see if I have any more.

The Court: What is the purpose of offering the building plans? I see some reason for offering some plans in regard to the furnishings.

Mr. Platt: Just to show their connection, if the Court please, with the furnishing plans. However, I think the record is pretty clear.

Mr. Denson: You have to have the building plans to make these plans from.

The Court: It might be sufficient to just offer the furnishing plans.

Mr. Platt: I will defer to your Honor's suggestion, just offer the furnishing plans.

The Court: Of course, if you have any definite reason, you may do so.

Mr. Platt: It has been suggested, according to Mr. Denson's testimony, that he made various sug-

(Testimony of P. G. Denson.)
gestions concerning [215] the plans of the building and that these suggestions were adopted.

Q. Let me ask you, Mr. Denson, whether the builder's plans that you were holding in your hand a minute ago comprehended or included your suggestions?

A. Yes, I haven't the plan here of the last change that was made of the size of the sky room. Mr. Moorehead had it but they refused to give it to me.

Q. With that exception these blue plans incorporate all your changes and suggestions?

A. Yes.

Mr. Platt: I think we will offer them.

The Court: You want to offer them all as one exhibit?

Mr. Platt: I think we will offer the blue plans as one exhibit and the furniture plans as the next.

Mr. Cooke: Do I understand you are offering both these blueprints and also this other document?

Mr. Platt: Yes.

A. This is a lay-out of the——

Mr. Platt (interrupting): Let us keep the record straight.

Q. You are holding in your hand, Mr. Denson, another set of plans. What are they?

A. It shows the set-up of the coffee shop, kitchen lay-out and also the dining-room off of the lobby.

Q. Who prepared that set-up?

A. It was prepared by Barker Bros. for Charles W. Mapes Company.

(Testimony of P. G. Denson.)

Q. And was this plan that you are now holding in your hand submitted to Charles W. Mapes by you and the other people present on——

A. (Interrupting): On April 1, 1946, of this year.

Q. This plan——

A. (Interrupting): All of these drawings, every one that I have here.

Q. On April 1, 1946?

A. April 1, 1946, in Mr. Moorehead's office.

Q. And Mr. Charles W. Mapes was present?

A. Mr. Charles W. Mapes and his uncle, Mr. Hart.

Mr. Platt: I think we will offer the Barker Bros. exhibit that Mr. Denson has just testified to. I do not want to burden the record too much.

The Court: Suppose we take our recess now and you can go over these plans with Mr. Denson and see just what you want to offer in the morning. Court will be in recess until tomorrow morning at 10:00 o'clock.

(Court recessed at 4:40 p.m.) [217]

Tuesday, October 29, 1946

Attorneys present as at previous session.

MR. DENSON

resumed the witness stand on further direct examination by Mr. Platt.

Q. For the purpose of the record, at the time of the recess yesterday, Mr. Denson, we were con-

(Testimony of P. G. Denson.)

sidering some maps and blueprints of the hotel. As I understand it, those maps and blueprints were examined in Mr. Moorehead's office in Oakland some time in January of 1946?

A. Yes, I received the prints from the office in January.

Q. And when was the conference held at which Miss Mason, a representative of Barker Bros., and Charles Mapes, Jr., one of the defendants, was among those present?

A. It was April 1st of this year.

Q. And were the blueprints and maps examined at that time and discussed? A. They were.

Q. I wish you would produce the blueprints of the hotel that were examined and discussed at that time.

A. Those are the blueprints of the building.

Mr. Platt: Your Honor, please, I offer these in evidence.

Mr. Cooke: I would like to ask the witness some questions, your Honor.

The Court: You may do so, Mr. Cooke. [218]

By Mr. Cooke:

Q. Who made the blueprints?

A. I couldn't say who made them, but they were furnished me by Mr. Moorehead.

Q. When were they furnished to you by Mr. Moorehead?

A. Mr. Moorehead furnished me plans from January. He furnished me plans before that, 1945 also.

(Testimony of P. G. Denson.)

Q. When were these particular prints furnished you by Mr. Moorehead?

A. The best I can remember those were furnished me in January.

Q. 1946?

A. 1946. In fact, I think Mr. Moorehead presented me three sets of blueprints.

Q. Is this just one set?

A. Yes, one set.

Q. And is this set now in exactly the same condition as it was when given to you by Mr. Moorehead?

A. This particular set?

Q. Yes.

A. Yes, they haven't been changed any.

Q. That is what I asked you.

A. Yes.

Q. You are not a draftsman yourself, are you?

A. Well, I can do some drafting, yes. I have had quite a bit of experience in drafting, but I have always had draftings [219] furnished to me from concerns I have been with. These were made from tracings, I presume, whether made off white paper or linen paper, I couldn't say just which.

Q. Do you know whether the building as constructed is pursuant to the map and plan as shown here?

A. There are probably some changes on these, Mr. Cooke. For instance, this blueprint up here, take the mezzanine here——

Mr. Platt: Pardon me, your Honor. Will you identify this print for the purpose of the record?

A. This is A-2 made on January 15, 1946, is

(Testimony of P. G. Denson.)

the date that is stamped here. This is the first floor plan showing the opening, skylight, from the mezzanine, and it is my understanding that that didn't go in and I objected to it, and do you want me to make statements as I go along?

Q. No, I would rather have you answer the question. The question is whether the building as now constructed is pursuant to the plans?

A. There is some change.

Q. What particular changes can you state?

A. I have never been in the building since they started construction but it is my understanding that this well from the mezzanine floor looking down on the lobby was not put in.

Q. For the purpose of the record, that appears as A-3. A. A-3.

Q. What is the legend there, can you read that?

A. It is open well.

Q. You would say that was closed?

A. I wouldn't say it is closed but it was supposed to be closed and due to the fact I objected to it—I called——

Q. (Interrupting): I don't care for that now. I just asked you whether it is closed or open now.

A. I couldn't say. It was supposed to be closed up.

Q. But your understanding is it is open?

A. I don't know whether it is.

Q. I say your understanding.

A. No, I didn't say it was my understanding it is open now.

(Testimony of P. G. Denson.)

Q. What is the change, as far as you know?

A. It was supposed to be closed and the opening wasn't supposed to be there.

Q. And you think there is an opening there?

A. No, I wouldn't say there is. I believe it has been closed up, that is my own belief it is.

Q. Are there any other changes in the building as constructed by way of departure from the plan here?

A. I objected to the small check room on the mezzanine floor because it was entirely too small.

Q. Referring to sheet A-3?

A. A-3. Mezzanine floor. That is what is known as the check room.

Q. That, as you understand, has not been constructed as shown [221] on the plan?

A. I couldn't say what they have done in regard to it, but it was my understanding and I was told it would be made larger.

Q. In all other respects you understand the building is constructed according to the blueprint here?

A. I wouldn't say it is, but the majority of it. The banquet room was to be larger than it is called for here.

Q. You mean as constructed?

A. Yes, I think it is constructed larger.

Q. You referred to sheet A-3. What about any other sheets comprised in that offer? Referring to the next sheet, in whatever order they occur there and by whatever legend and designation they may

(Testimony of P. G. Denson.)

carry, and state if there were any changes in construction that you know of from that shown upon the prints?

A. I don't know anything about sheet 4 at all. This is floor plan of rooms and apartments.

Q. Do you know whether or not there ever was a sheet 4?

A. If you will allow me to look at another set of plans I will see if I have a sheet 4. No, there is no sheet 4.

Q. Do you know whether there ever was a sheet f? A. That I couldn't say,

Q. Well, the next one then would be sheet No. 5. Does the building as constructed, as far as you know, conform to the plans as shown upon that sheet No. 5? [222]

A. This is a general lay-out, Mr. Cooke. I don't know just exactly whether these are the size closets we prepared, but we did have quite a discussion in regard to the size of closets and rooms.

Q. What difference is there in the building now as far as constructed and that shown upon that plan?

A. I couldn't say because I have not been inside the building at all.

Q. You haven't any information as to there being any changes?

A. No, I have never been inside the building since they started construction.

Q. Did you ever talk the matter over with Mr.

(Testimony of P. G. Denson.)

Moorehead, whether the building was constructed according to these plans, any changes made?

A. I was in Mr. Moorehead's office quite a few times since I got these drawings and on the first of April when we first arrived at his office, we spoke about details and dimensions on the drawings and he assured me by the 15th of April there would be detailed drawings furnished to me.

Q. Is that the only discussion you had with him in regard to drawings?

A. No, we discussed the size of the sky room.

Q. I asked you if that is the only discussion?

A. We had a lot of discussions. Practically all morning all we discussed was plans. [223]

Q. What date was that?

A. That was April 1st of this year.

Q. Does the same answer apply to the balance of these sheets here?

A. Well, we will go into this a little more thoroughly if you like.

Q. You are referring now to sheet A-6?

A. That is right.

Q. All right, what about that?

A. It is the sky room and it shows where it goes back in and much smaller back there and over this roof. I can't understand why they didn't carry it out and I was informed a few days afterward and shown the drawings that was carried out. Of course, this lay-out had to be changed accordingly.

So far as this sheet is concerned, it does not show the location of the sky room?

(Testimony of P. G. Denson.)

A. This does show the location of the sky room and I notice under here—I was asking and trying to insist on another elevator, to have three passenger elevators, and I see on here it is proposed to put the shaft in for the time being, but I have been told that they are going to have three passenger elevators.

Q. This shows the present location of the sky room, is that right?

A. This plan was before they had agreed to carry it all the way through here, so I have been informed by the mechanical [224] engineer.

Q. In other words, the sky room takes up the whole floor? A. That is what I understand.

Q. This is just part? A. This is part.

Q. Anything more you want to say?

A. I just spoke about the elevator. I understand and have been informed by Mr. Moorehead that the third elevator is going in.

Q. Now referring to sheet No. 8.

A. That is an elevation plan of the building.

Q. There is substantially no particular change in that in any way, do you know?

A. Well, this was a change from the first sketch they got out. They show a basement on it. It is around here somewhere.

Q. That was furnished to you by Mr. Moorehead, you say?

A. I can't remember whether Mr. Moorehead mailed it to me or gave it to me in his office, but I

(Testimony of P. G. Denson.)

was in his office several times looking at drawings. I don't think they will deny that.

Q. You went over those particular prints there?

A. Yes.

Q. And with reference to the date of April 1, 1946, when was it you went over those with Mr. Moorehead?

A. We were in his office with all the drawings by Barker Bros., with the set of plans brought up by Barker Bros. That is what [225] we had to work with.

Q. Do I understand these plans were furnished to you by Barker Bros.?

A. I furnished these to Barker Bros. myself.

Q. You got them first from Mr. Moorehead?

A. That's right.

Q. How long before April 1st did you get those?

A. I didn't get them April 1st.

Q. I said how long before April 1st?

A. Some time in January.

Q. 1946? A. 1946, yes.

Q. How soon after that did you deliver them to Barker Bros.?

A. I delivered them to Barker Bros. as soon as I got them. I can't remember just what date. We have been working on this all the time.

Q. About January——

A. (Interrupting): I couldn't say the date, but I know it was in January, I know that.

Q. And you delivered them to Barker Bros. immediately afterwards, is that right?

(Testimony of P. G. Denson.)

A. Yes. In fact, I was in Barker Bros. quite often.

Q. Were they furnished by Mr. Moorehead for the purpose of being delivered to Barker Bros.?

A. I probably told Mr. Moorehead I was having Barker Bros. get [226] out drawings. It wasn't anything to Mr. Moorehead about where I was taking drawings to. Charles Mapes was supposed to be my associate and I couldn't do anything without submitting drawings and things to him and I had to get drawings to submit to him. I couldn't give an order without Mapes' consent. In fact, all the firms I dealt with——

Q. (Interrupting): I didn't ask you anything about that. If you will answer the question we will get along better.

A. All right, I will answer any question.

Q. How long was it after you delivered those prints to Barker Bros. before you next saw them?

A. I was in there off and on probably every week after that.

Q. How long was it after you delivered it to them did you next see those prints?

A. After they were first given to them I was in there about two weeks after that.

Q. In Barker Bros.?

A. Yes and in February I was in Barker Bros. and spent quite a bit of time in March with Barker Bros. Spent more time in March than any other time.

Q. And all told there were some two or three

(Testimony of P. G. Denson.)

or more occasions that you visited with Barker Bros.?

A. Oh, I presume I was there at least half a dozen times, probably more.

Q. And then on April 1st they brought these prints up? [227]

A. Miss Mason brought them up. She came up on March 31st and I came up on the 31st.

Q. And you had a meeting on April 1st?

A. Yes, April 1st of this year.

Mr. Cooke: The defendants object to the admission in evidence of the offer of the blueprints on the ground the same are irrelevant and immaterial to any issue in the case; that it is an attempt on the part of the plaintiff to change a written contract by parole evidence in violation of the rule; that if the documents are admitted for any purpose whatever, it will be in connection with so-called part performance of some contract which isn't pleaded or shown, some oral contract or addition or oral supplement to the written contract, and in that connection I wish to explain my objection more on the same objections than I have. That the blueprints offered in evidence would constitute a part of the oral evidence relied upon by the plaintiff to supplement or to otherwise add to or change the terms of the written agreement and it is objected to on the ground, first, that under NCL, Section 1527 and 1529 the dynamics of this case must be based exclusively upon the September 24, 1945 instrument; second, the September 24, 1945 agreement is vague

(Testimony of P. G. Denson.)

and indecisive and the same is unenforceable as to any consideration not expressed upon the face of the writing; third, the September 24, 1945 agreement, being in writing, the same can not be altered, added to or varied [228] by parole evidence; fourth, the plaintiff's plea of part performance and evidence offered thereunder is inadmissible, irrelevant and immaterial because no showing is made that the alleged part performance is of anything required by the alleged oral agreement to be done by plaintiff, but at most shows things done by the plaintiff in reliance upon the alleged oral agreement; fifth, no consideration is either alleged or claimed under Exhibit A. It seems to me, your Honor, we have reached a rather serious pass. Here we have established that, except as to leases for a term not exceeding one year, no agreement affecting real property, or creating any right or trust or power concerning the same, shall be valid for any purposes except by an instrument in writing, signed by the party to be charged. That is our statute of authorities. I give it from memory, 1527 I think is the number. That simply means a mandate from the law-making body that with reference to the instruments included in the statute, all of them except leases for a term of less than one year, that the only evidence the Court is entitled to consider is a written document signed by the parties, so that so far as the statute itself is concerned, it must be admitted that any attempt to bring in evidence such as is now sought to be brought in by the

(Testimony of P. G. Denson.)

plaintiff, would be in violation of that statute. The statute provides, however, in another section that this rule shall not prevent a court from enforcing an agreement where part performance is [229] shown. The court has heard what part performance consists of. Part performance must first show a contract, because you can't perform something that isn't contracted to be done. Here we have a written contract admittedly, such as it is. Whether it is complete or not is a matter to be discussed by counsel and the authorities, but admittedly there is nothing in that written contract that requires him to do any of the things that we listened to practically all day yesterday and I expect we will listen to more of it yet. If the written contract had provided that Mr. Denson was to see to the getting of prints for this job and was to do this and that and to sell his hotel in Visalia and then he goes on and shows that he did those things, that would be a part performance of the written contract, but that is not what the suit is for. What the suit is for is part performance of an alleged oral agreement, so that these things, so that as I see it in this case, before this Court or any other court will be entitled to go ahead and listen to this type of evidence, there first has to be evidence of some kind of oral contract whereby Mr. Denson was requested to do this that and the other thing and then he goes and shows that he actually performed the things that the oral contract called on him to perform, then you would have a case of part performance, but there

(Testimony of P. G. Denson.)

can not be part performance of something not required to be performed and there is nothing in any oral agreement or understanding anything [230] should be done in preparation of the maps. Ordinarily we think courts take judicial notice of that fact. The architect for the building and contractor, like Mr. Moorehead and Mr. Slocum, they would be the ones to prepare plans for the building and not Barker Bros., and not even Mr. Denson, who is simply a prospective lessee, if he was that, so that wasn't any of his business to concern himself about that. Of course, if he wanted to, that is all right, but to bring it in here as part of a part performance proposition, we think is entirely uninvited and by the parole evidence rule you can not allege that in any way by anything said. We listened to quite a bit of evidence yesterday and this is more coming in this morning, in regard to what was done and said. It has to give some kind of showing, some kind of charge in that written contract that this was waived and that the parties agreed upon the changes and he spent this time on the Mapes and had conferences with the interior decorator, etc., and that is part performance. Of what? Has your Honor heard any testimony in this case as to anything required of him, that they called upon him to do any of these acts? If he volunteered to go out and do them, that is not part performance. Part performance is only those things required to be performed and nothing was required here of Mr. Denson. Hence we say this objection ought to be

(Testimony of P. G. Denson.)

sustained and all this testimony eliminated and the case decided squarely upon the terms of that written document. We are on [231] dangerous ground. That is our view of it, your Honor.

The Court: This is a thought that entered into my mind in overruling some of the objections that were made on similar grounds. The complaint charges that the plaintiff has no plain, speedy or adequate remedy at law. That is one of the questions, of course, we are going to have to decide in this case, to determine whether or not it is a proper case for a decree of specific performance. Now to aid in coming to some conclusion in regard to that question, wouldn't evidence of the detriment that may or may not be suffered, or would be suffered if this contract is not carried out be considered, with the idea of the Court coming to some conclusion as to what the detriment, if any, has been and whether there is an adequate remedy at law.

Mr. Cooke: Well, in answer to that, I think not.

The Court: Isn't that one of the elements that could be considered in an action for breach of a contract, detriment suffered?

Mr. Cooke: Well, in this case Mr. Denson spent certain time with these blueprints. That, of itself, would not be any part performance because that would be action for dollars and cents. His time, we will say, is worth \$10 or \$20 [232] a day—

The Court: Isn't that a question outside the scope of any question of part performance?

Mr. Cooke: What I am trying to get, your

(Testimony of P. G. Denson.)

Honor, is that they have to show an oral contract that is to be wholly performed. The written contract speaks for itself. These things must be upon some oral agreement.

The Court: If the Court agreed entirely with the points raised in your objection, I still believe the evidence would be admissible, on the theory the Court is entitled to know in this case, first, there has been a written contract shown and it is evident there is inclination on the part of the defendant not to comply with it, and now, what, if any, damage has resulted to the plaintiff and is that damage, if any, subject to being compensated for in dollars and cents, getting back to the question of whether there is an adequate remedy at law that should be pursued and whether or not the decree of specific performance could be granted. That is the point I have in mind.

Mr. Cooke: I think I get your Honor's meaning, but in answer to that I would say this: this is not an action for damages, it is an action for specific performance. The plaintiff [233] does not want any damages. He has repudiated the idea of asking for damages in this case by demanding for specific performance he had by a lease being authorized to him and Charles W. Mapes, Jr., and if Charles Mapes does not want it, he alone, and that he is able to go ahead and that in a nutshell is the upshot of his case, he wants the lease in his own name. It isn't a case of damages, the prayer shows that.

(Testimony of P. G. Denson.)

The Court: I know that. Pardon me a moment—I may be incorrect in regard to the law governing this case, but my impression is, subject, of course to arguments and consideration on any points that counsel on either side may advance, but my idea in this case is this; if the evidence in this case discloses that there was a contract, which I think is admitted, and if the evidence also shows that the defendant does not intend to comply with the terms of that contract, or if it shows that the defendants have repudiated and continue in the repudiation of the contract, what damages, what detriment has been suffered by the plaintiff, and can it be compensated for in dollars and cents, and if it can, my position would be to refuse decree of specific performance. There will be adequate remedy at law that should be pursued. [234]

Mr. Cooke: I think your Honor is right in at least part and maybe all, but it is our contention, based upon the authorities such as we found them, rather unanimous, however, and I hardly think there is any question that the authorities are not unanimous, but where a suit for specific performance is brought a Court will not retain the case for the purpose of awarding damages.

The Court: There would be no idea in my mind to try to retain the case to award damages, but if I found—that is my present impression and I would like to have counsel understand it, so if I am wrong they can take note of it and cite authorities to the contrary, that if this case discloses to my mind and

(Testimony of P. G. Denson.)

I come to the conclusion that there first has been a contract that has been violated, breached and repudiated, that the detriment suffered can be adequately compensated by dollars and cents, I am going to decline to grant a decree of specific performance.

Mr. Cooke: In other words, that ends the case.

The Court: As far as I am concerned, and that is the way I am going to admit this testimony. As I understand, I do not think it is disputed there is a contract, second, it is being and [235] has been repudiated and I want to find out what the plaintiff has suffered in consequence of the breach, and then if that suffering can be made whole by dollars and cents, I would then follow that with a denial of the prayer of the complaint.

Mr. Cooke: Your Honor has assumed, it seems to me, that there is a contract to start with. There is a document here, it is true, but the document on its face shows it is not a contract, but simply a preliminary negotiation that was intended to lead up to a contract, provided the parties could agree, so we take the stand there was not an agreement. That document does not constitute an agreement, unless it is an agreement to get together and see if they could agree, but that is not an agreement under the authorities that would bind anybody.

The Court: I merely made this statement to explain why I am going to admit this testimony and so counsel, if they believe my theory as now stated is incorrect, may have plenty of opportunity

(Testimony of P. G. Denson.)

to cite authorities and I assure them I am not one who will hesitate to drop down from my position and try to get on the right track.

Mr. Cooke: We would like at this time, your Honor has mentioned the fact of repudiation, to state that we are [236] not disposed to accept the rule of repudiation at all, because there is nothing to repudiate. We were carrying out the agreement and trying to get this man together on terms of a lease, but the document itself does not constitute any agreement, either at law or equity, and we have a vast amount of authority on that, so we are not repudiating.

The Court: The objection will be overruled and the exhibit will be admitted in evidence as Plaintiff's Exhibit D.

Q. Mr. Denson, that Exhibit "D," which constitutes the blueprints, was examined by you and Charles Mapes and Miss Mason and the persons who were represented at the conference in Oakland in Mr. Moorehead's office?

Mr. Cooke: I do not think it is necessary to lead the witness. I object to it as leading.

The Court: Objection will be overruled.

A. As I think I stated yesterday——

Q. (Interrupting): Answer the question.

A. Yes, they were all examined by the parties that you spoke of.

Q. And did Miss Mason submit any plans?

A. She did.

(Testimony of P. G. Denson.)

Q. And have you the plans that she submitted?

A. I have.

Q. Will you produce them? [237]

A. It shows more or less the picture of the coffee shop.

Q. Well, one of these is marked, "Submitted by Barker Bros. Hotel and Apartment Division. Proposed Coffee Shop for Charles W. Mapes Company, Reno, Nevada." The other one has the legend, "Furniture Lay-out for Typical Hotel Rooms, C. W. Mapes Company, Reno, Nevada, Submitted by Barker Bros. Hotel and Apartment Division." We offer them in evidence.

Q. (By Mr. Cooke): What did you have to do with the preparation of these?

A. They were submitted to me at various times. In fact, we went over things in regard to ideas and lay-out of furniture, and I worked with Barker Bros. on that.

Q. What did you have to do with the preparation of them, anything at all?

A. Nothing in preparing them, I didn't at all, but I passed on them and informed them that I would submit them to Charles for his approval.

Mr. Cooke: I am going to ask to strike out the latter part of that answer as not responsive.

The Court: The answer may stand.

A. I didn't prepare any of them.

Q. Who did prepare them, if you know?

A. By parties in Barker Bros.

(Testimony of P. G. Denson.)

Q. And these were part of the papers that Miss Mason brought [238] up on this occasion?

A. Miss Mason brought those up. She brought them up on April 1st but she took them back to Los Angeles. I got them at Barker Bros. afterwards.

Mr. Cooke: We object to the admission in evidence, upon the grounds it is irrelevant and immaterial, all and singular the objections stated to the offer of Exhibit D, and on the further ground it is not shown that this witness had anything to do, spent any time or work or effort in connection with them. The things were done by Barker Bros., who were looking for a chance to sell some furniture, I suppose, and were willing to do this work, and he gets this map from them and used on that conference, but in what way that can constitute any part performance or have any fundamental value to your Honor on any theory of the case, we submit is far from clear; in fact, does not exist at all. If he had found these things in the garbage, it would have been the same thing. In fact, it would have been more effort to get them in that way than the way he did. I understand your Honor's theory of this case is, and I am in harmony with the general proposition, that if Mr. Denson, for instance, has expended time and effort, that should be considered in the case, either in connection with the matter of remedy in law or by specific performance, but if no time was expended, nothing done by him at all, somebody puts a drawing in his hands to bring in here [239] and he says, "I want specific perform-

(Testimony of P. G. Denson.)

ance” and I say, “How did you get them, who furnished them, what did you have to do with them?” and he says, “Nothing.” In what way can that help the Court in determining that he is entitled to any equitable relief or any relief of any kind? If he spent five or ten days or one hour in the actual work in preparing them, he could testify to that and then find out what his time was worth and have a case for damages or value recoverable perhaps, but he does not even spend one hour or any time on this.

The Court: The objection will be overruled and exhibit admitted as Plaintiff’s Exhibit E.

Direct Examination

(Continued)

By Mr. Platt:

Q. Did you make any effort to obtain plans from the Dohrmann Company in San Francisco?

A. I did.

Q. And about when did you do that?

A. The first part of January.

Q. 1946?

A. Yes, also in December I visited Barker Bros.

Q. I am not asking about Barker Bros.

A. I mean Dohrmann Hotel Supply Company, and they made up plans for the kitchen lay-out. We were anxious to get those out. They thought it might help them in laying out the openings in the kitchen as the building was being constructed.

(Testimony of P. G. Denson.)

Q. Were those plans submitted by the Dohrmann Company to you? [240]

A. Yes, they were.

Q. And did you in turn submit them to any one of the defendants, Charles W. Mapes or Irene Gladys Mapes or Gloria Mapes?

A. I wouldn't say that they were submitted to Mrs. Mapes, but they were shown to Charles.

Q. When were they shown to Charles?

A. In Mr. Moorehead's office.

Q. On what occasion?

A. Well, I had some of those—I think I furnished them to Mr. Moorhead's office. I am positive Charles had seen them. I can't say he was there when they were furnished—whether in April of this year when we went over other things, but we were getting designs from—

Mr. Cook (Interrupting): Objected to as not responsive.

Q. Just a minute—do you recall whether you submitted plans from Dohrmann's to Charles W. Mapes?

Mr. Cooke: We submit he has already answered the question.

Mr. Platt: I don't think he has.

The Court: You may answer the question.

A. I have shown Charles practically all the plans I had made.

Mr. Cooke: We move to strike as not responsive to the question.

(Testimony of P. G. Denson.)

The Court: I do not believe it is responsive.

Q. Do you know whether you submitted plans from the Dohrmann people to Charles W. Mapes?

A. I did.

Q. Do you remember when you did?

A. It is hard to remember just what dates they were, but they were after the plans were drawn.

Q. Will you produce them?

A. There are some here dated January 7th.

Q. You submit plan with the legend, "Dohr. Co. Floor Plan." Underneath, "Dohrmann Hotel Supply Co. No. 215-5604," and another plan with the legend, "Diagonal Seating Arrangement" and the last one, "Proposed Floor Plan 215-5669." We offer that as one exhibit.

Q. (By Mr. Cooke): Who did the actual work of preparing these various prints, or what do you call them?

A. That is a sketch. I wouldn't say just what draftsman at Dohrmann's did it. I dealt with Mr. Wilson and Mr.——

Q. You personally didn't have anything to do with that? A. I did not.

Q. With any of them?

A. Not so far as making them. They were submitted to me for my approval.

Q. By Dohrmann's?

A. By Dohrmann's. [242]

Q. When were they made by Dohrmann's?

A. The dates are on there.

(Testimony of P. G. Denson.)

Q. I don't see any date. Were they all made at the same time as far as you know?

A. I can't say.

Q. All handed to you together, were they?

A. At different times. This one here is March 18th. That one there I think is January 7th of this year.

Mr. Platt: March 18th of this year?

A. One is March 18th of this year, that last one.

Q. (By Mr. Cooke): I see the legend, "Drawn by Wilson & Hegberg." Those were, as far as you know, the draftsmen in the employ of Dohrmann Hotel Company?

A. Wilson I am very familiar with. I have met Hegberg.

Q. That is his business?

A. That is his business.

Q. I notice this is for Peter Denson, architect. In what way did that part of the legend happen to be on there? Did you request that?

A. They were made for me. I instructed them to make them up.

Mr. Cooke: Defendants object to the admission in evidence of the offer of the sketches on the ground that it affirmatively appears the plaintiff in this case had nothing to do with the actual work of preparing them, spent no time on them. They were furnished to him gratis, so far as the evidence [243] shows, by the Dohrmann Hotel Supply Company people and for that reason they would be immaterial on the question of damages. They are immate-

(Testimony of P. G. Denson.)

rial for each and all of the reasons stated to objections which we made on previous offers, which we would like to have repeated and made here to the same effect as if repeated.

The Court: The same ruling, objection overruled and admitted as Plaintiff's Exhibit F.

Direct Examination

(Continued)

By Mr. Platt:

Q. The plans that you are now submitting, state the nature and character of them and who furnished them.

A. These are the first lay-outs of the first floor, showing the lay-out of the coffee shop, the kitchen lay-out and also the dining room.

Q. Who submitted that plan?

A. Barker Bros. submitted this to me and they were made for Charles W. Mapes Company. That was my instructions to them. There is one there and here are over a half dozen here from the ground floor right on up, including this sky room.

Q. Submitted by Barker Bros.?

A. By Barker Bros.

Q. And were the plans called to the attention of Charles W. Mapes?

A. These were all shown to Charles W. Mapes, Mr. Moorehead, [244] Mr. Slocum, in fact, Mr. Moorehead's entire staff, on April 1st. Mr. Hart, his uncle, was with us.

Mr. Cooke: Who was that?

(Testimony of P. G. Denson.)

A. Mrs. Mapes' brother, Mr. Hart, I feel that that was his name, I am not quite positive.

Q. (By Mr. Platt): And this group of plans that you have just submitted was all submitted upon that occasion on April 1, 1946, and was there any discussion had with respect to the plans?

A. The plans were discussed fully over two hours, I would say, two and one-half hours, I don't remember just the exact time. I think we were there between 9:00 and 10:00. Mr. Moorehead and the rest of them can verify that.

Q. And did the defendant, Charles W. Mapes, Jr., participate in the discussion?

A. Absolutely.

Mr. Platt: We offer these plans in evidence as one exhibit.

Q. (By Mr. Cooke): I think you told us these were prepared by Barker Bros.?

A. By Barker Bros.

Q. They were prepared by Barker Bros. with the tentative promise or arrangement that they would have a chance to furnish some furniture?

A. They were promised nothing. [245]

Q. Didn't you have any tentative arrangement with them?

A. No, I did not promise. They had been notified I couldn't place an order—Charles Mapes and Mrs. Mapes both knew——

Q. (Interrupting): You didn't pay them anything for these? A. No, I haven't.

Q. You are not obligated to pay them anything?

(Testimony of P. G. Denson.)

A. I am not obligated. I have done business with Barker Bros. for many years.

Mr. Cooke: We ask that be stricken.

The Court: That may be stricken.

Q. What date were these prepared, as far as you know, Mr. Denson?

A. They worked on these plans off and on January, February, and March. I think they had around three different ones working there during the first part of March to get the plans out.

Q. When did you first see them in the condition and form they are in now?

A. We made many changes. I saw them off and on for some time through the month of March.

Q. How are the changes noted?

A. The changes are not noted on here. They had me in there several times, Mr. Cooke, looking them over.

Q. In Los Angeles? A. Yes.

Q. But in their completed form, so far as they are completed, [246] when did you first see them?

A. These are not detailed drawings, just something proposed, an idea, that is all.

Q. When did you first see this exhibit here in its present form?

A. Some time in March. I couldn't say just what date.

Q. And when did you first take them up with any of the defendants or with Mr. Moorehead?

A. April 1st of this year.

Q. You had them from this time in March when

(Testimony of P. G. Denson.)

you got them down to April 1st before you took them up with any of the Mapes?

A. I was with them on these drawings. They were submitted to me before April 1st by Barker Bros. in Los Angeles.

Q. You got them some time in March?

A. I didn't say I got them some time in March.

Q. When did you get this particular document that is offered in evidence?

A. I think they were given to me the latter part of April or May. I think I picked them up in Los Angeles and brought them up.

Q. The latter part of April or May?

A. Of this year.

Q. And did you have them in your possession at all prior to that time? [247]

A. I have had them in my possession ever since I picked them up at Barker Bros. to bring them up.

Q. You had them on April 1st?

A. I didn't get them on April 1st. The designer brought them to San Francisco on March 31st and they were shown to Charles Mapes on April 1st.

Q. The people who were at that meeting used these papers, they had them there present?

A. They looked over all these drawings, every one I have here.

Q. And then they were returned to Barker Bros.?

A. That is right.

Q. And then you got them from Barker Bros. and brought them up here?

A. That's right.

(Testimony of P. G. Denson.)

Q. Do you know whether or not the building was constructed in conformity with the designs and drawing?

A. As far as I know of that particular lay-out on the first floor they are. There may be a few little changes in regard to where the coffee shop was supposed to be.

Q. Do you know from what source Barker Bros. got their information from which they made this?

A. They took that from drawings made by T. P. Moorehead Company.

Q. From whom did they get those blueprints?

A. From me. [248]

Q. Then all you had to do with this document here was to furnish the blueprints that Mr. Moorehead furnished you to Barker Bros. and then to receive the lay-outs, as you call it, from Barker Bros. draftsmen through Miss Mason, was it, who brought them up at the meeting on April 1st, and then they were returned to Barker Bros. and then you got them later on and brought them up here?

A. I worked with them on the drawings. I didn't actually make the drawings but I sat in with them on several occasions and made changes. The changes wouldn't show on there.

Q. You mean there is a difference between this lay-out here and the drawings by Mr. Moorehead, the blueprint?

A. Oh, no. The drawings that Mr. Moorehead made doesn't show any of this lay-out. He just

(Testimony of P. G. Denson.)

shows the wall heights and spaces he was giving us to work with and that is what we used.

Q. Then from what source did Barker Bros. get the material to put on this map?

A. This is sketched from the blueprints. They made the sketch itself, according to dimensions they had on the blueprint.

Q. How much time did you spend on the job?

A. Quite a bit. I was in Barker Bros. off and on for some time.

Q. Can you tell us anything about the dates?

A. I was with them for the month of March right through, I would say two or three times each week up until the time I [248] left there on the 31st of March.

Q. How much time did you spend there each week?

A. Around two to three hours each sitting.

Q. What was the name of the man that you worked with?

A. Earl Crawford, the manager, Miss Mason, and it is hard to recall the names of the other two parties that did some of this work. I don't remember just the names, but they can be furnished.

Q. What I want to get is the time you spent with men down there that did this work.

A. All my time was spent with Miss Mason in the drafting room and also with Mr. Crawford's office, looking over various designs they got out.

Q. Who is Mr. Crawford?

(Testimony of P. G. Denson.)

A. Manager of the wholesale department of Barker Bros.

Q. Can you tell us any nearer than you already have as to the time you spent with draftsmen on this exhibit?

A. Two to three hours each time I called.

Q. That would be two or three times a week?

A. Yes.

Q. Two or three hours each time?

A. That's right.

Q. Two or three times a week?

A. That's right.

Q. You don't know how many weeks? [250]

A. All through March, 1946.

Q. You can't tell us the name of the man you spent this time with, the draftsman?

A. Mr. Crawford and Miss Mason I spent most of my time with them. The other fellows would be in Mr. Crawford's office, going over the things with him.

Q. Mr. Crawford was general manager——

A. (Interrupting): He was right there.

Q. He didn't have anything to do with drafting?

A. No, he didn't draft.

Q. Can you tell me how much time was spent by you?

A. I just told you that; two to three hours each time the different times I called at Barker Bros.

Q. Now listen to the question. That is the time you spent with the man who was doing the drafting for Barker Bros., was it?

(Testimony of P. G. Denson.)

A. Well, I would say yes.

Q. You don't know his name? A. No.

Q. Was there more than one?

A. I think three altogether that worked on these.

Q. You don't know the name of any of them?

A. I did know but I can't remember just what their names are.

Mr. Cooke: We object to the admission in evidence of the document, your Honor please, on the ground no proper [251] foundation has been laid to show that the witness had anything to do with the work shown upon it; that in any event it is irrelevant and immaterial and does not prove or tend to prove any issue in the case, and here we repeat jointly and singularly the objections that we made to the previous offers and ask that they be considered without being repeated.

The Court: They may be so considered. The objection is overruled and the exhibit admitted in evidence as Plaintiff's Exhibit G.

Mr. Platt: Because of your Honor's rulings, I am not attempting to answer Mr. Cooke's arguments at this time. Your Honor has admitted the exhibits in evidence subject to objections, so that the objections will be argued later.

The Court: The objections have been overruled. This evidence is all in under reserved ruling on the first objection made at the beginning of the case.

Mr. Platt: That is right.

Witness: Those are part of the drawings made by Barker Bros.

(Testimony of P. G. Denson.)

Mr. Cooke: I would like to see them.

Mr. Platt: You may examine them if you like. They lay right there on the desk.

Mr. Cooke: Well, there are lots of drawings on the desk I didn't know were offered. [252]

Q. (By Mr. Cooke): One of these sketches that seems to be embraced in this offer has a legend, "Room Floor Plan East Wing Hotel Building, Charles W. Mapes Company, Reno, Nevada," is that prepared by Barker Bros. in the same manner and under the same conditions as the other portion of the exhibit you testified about? A. Yes, sir.

Q. And was delivered to you along the same way? A. Yes, sir.

Q. And brought to the April meeting by Miss Mason? A. That's right.

Q. And the explanation you made all applies here? A. All applies.

Q. And is that also true with the other sheets and sketches?

A. Let me see if there are any other sketches.

Q. I call your attention to one marked, "Bar, Sky Room, Chas. W. Mapes Company, Reno, Nevada," was that prepared by Barker Bros.' draftsmen? A. It was.

Q. Under the same condition as applied to the other portion of the exhibit I asked you about?

A. That's right.

Q. Now the next one has a legend, "Barker Bros. Hotel Division, Los Angeles, Cal.," that is the only legend there is there so far as I can see.

(Testimony of P. G. Denson.)

Anyway, that is one of the documents [253] prepared by Barker Bros. and submitted at the same time and under the same conditions?

A. April 1st, yes.

Q. This one here has the legend, "Casino Bar Street Floor, C. W. Mapes Hotel, Reno, Nevada." Is that one of the sketches that was prepared by Barker Bros. that you testified to? A. It is.

Q. At the same time and in the same manner and under the same conditions? A. Yes.

Q. And this one has a legend, "Submitted by Barker Bros. Hotel and Apartment Division" and that also has legend, "Proposed Lay-out C. W. Mapes Hotel, Reno, Nevada." That was prepared by Barker Bros.? A. It was.

Q. At the same time and under the same conditions? A. That is correct.

Q. And used in the same way that you testified in regard to the others? A. That is correct.

Q. The other one has the legend, "Proposed Plan First Floor Charles W. Mapes, Reno, Nevada, Submitted by Barker Bros. Hotel and Apartment House Division, Los Angeles, Cal." Does the same answer apply to that, Mr. Denson?

A. The same. [254]

Q. At the time you had that meeting on April 1st and these were all examined as you told us and discussed by the various members present, were any changes suggested in the discussion?

A. There were many discussions. We were in Mr. Moorehead's office from the time they arrived

(Testimony of P. G. Denson.)

at 9:30 or 10:00 o'clock until at least around 12:00 o'clock.

Q. In order that we get the record clear on this, one portion of it has been stuck on and the portion stuck on carries the legend, "Submitted by Barker Bros. Hotel and Apartment House Division, Los Angeles, Quarter Inch to One Foot", and has the further legend, "Proposed Lay-out Top Floor, Service Way and Casino, C. W. Mapes Company Hotel, Reno, Nevada" and down in the corner is marked "3-29-46". That is one of the papers, I understand you to say was prepared by Barker Bros.?

A. That is right.

Q. At the same time and under the same conditions and used at this meeting as you have already testified to?

A. That is true.

Q. And all the answers you gave in regard to the others will apply to this?

A. That is right.

Q. At the meeting that was held on April 1st, 1946, in San Francisco when Miss Mason was there with these papers, were the drawings or lay-outs as shown by these sketches and prints criticized by anybody?

A. There might have been some criticism. I wouldn't attempt to say just what they were, but they were looked over. These were just proposed drawings. They were looked over, subject to approval. Now this is a mezzanine lay-out by Barker Bros. for the banquet room.

(Testimony of P. G. Denson.)

Q. This has a legend, "Banquet Room, Mezazine Floor, Chas. W. Mapes Company Hotel Reno, Nevada, Suggested Furnishings by Barker Bros. Hotel Division, Los Angeles, Cal." I note there are quite a number of lead pencil notes on it.

Q. Well, what you see there was made by Miss Mason right in Mr. Moorehead's office that day in regard to some notes that she and Mr. Slocum and Mr. Moorehead had discussed. She made quite a few little changes on my instructions.

Q. That was one of the sketches prepared in Los Angeles?

A. Yes, and submitted at that particular date.

Q. And the same answer that applies to the previous exhibits applies there too?

A. That is correct.

Q. Do you know anything about any of these things shown on these sketches that was carried into the building?

A. I couldn't answer that.

Q. You don't know whether they were of any real value at all?

A. Well, they were very valuable to me.

Q. I mean any value to the construction of the building?

A. Well, some——

Q. (Interrupting) You say valuable to you, in what way?

A. They would have been valuable to Charles and myself in regard to particular lay-outs and furnishings.

(Testimony of P. G. Denson.)

Q. You mean in getting the kind of furnishings and so forth?

A. Everything.

Q. That these would have been valuable to you?

A. Yes, they would.

Q. This one has a legend, "Room Floor Plan Hotel Building for Chas. W. Mapes Co., Reno, Nevada" down in the right-hand corner?

A. Yes.

Q. And that purports to be what, as far as you can tell?

A. Typical floor plan showing apartments layout, out, kitchenette, dinnette, living room and closet space.

Q. Any particular floor?

A. Well, that is over on this wing, on this side, over here on the river side.

Q. On the south side of the building?

A. Wait a minute, let me get this correct. I think this is Virginia Street.

Q. What do you mean by "this"?

A. These rooms here. These are rooms on the Virginia Street side. This plan showing this layout.

Q. The bottom of the sketch shows stores on Virginia Street?

A. It doesn't show the stores. These are rooms. This is an apartment here and this is an apartment here, right where the [257] elevators would be.

Q. The bottom of that is on the Virginia Street side?

(Testimony of P. G. Denson.)

Mr. Platt: I object to this line of testimony. It is taking up an unnecessary amount of time.

The Court: The witness has already answered the question.

Mr. Platt: I object to further testimony along this line.

The Court: Objection will be overruled.

Q. (By Mr. Cooke): This plan that you hand me now has the legend, "Sky Room," Hotel for Chas. W. Mapes Company, Reno, Nevada, Suggested Furnishings," is that—

A. (Interrupting): It is a proposed lay-out.

Q. No, this word, can you read it?

A. Suggested furnishings.

Q. "Suggested Furnishings by Barker Bros. Hotel Division, Los Angeles, Cal." What does that exhibit represent, so far as you know?

A. This is over in the dining room and this would be the cocktail lounge, I presume that is the southwest corner.

Q. That is on the top floor of the sky room?

A. That is right, the Sky Room. This is the cocktail lounge on that side. The proposed lay-out and bar, tables and chairs.

Q. And this was prepared by Barker Bros. under the same conditions as you testified? [258]

A. That is right.

Mr. Cooke: I object to the admission in evidence of Exhibit G.

Mr. Platt: They are all from Barker Bros. and I suggest they be included as one exhibit.

(Testimony of P. G. Denson.)

The Court: Mr. Cooke is entitled to make objection. It will be marked G-1.

Mr. Cooke: Then my objection goes to the offer of G-1, on the ground it is irrelevant and immaterial, does not show the witness had anything to do with the preparation, did not spend any time or money in securing the same, does not constitute any part performance of anything. They aren't evidence of anything at all. They tend to vary from the written agreement to prove by parole what must come under the statute of writings. We repeat the objection heretofore made to preceding offers, Exhibits F and E.

The Court: The objections heretofore made may be deemed to be included in this objection and this objection will be overruled. The exhibit will be admitted in evidence as Plaintiff's Exhibit G-1.

Direct Examination

(Continued)

By Mr. Platt:

Q. Mr. Denson, did you obtain plans from any other sources for furnishings and equipment?

A. I went to Mangrum-Holbrook & Elkus in San Francisco.

Q. Did they submit any plans to you?

A. They did.

Q. When did they do that?

A. Mangrum-Holbrook & Elkus' plan is dated March 13, 1946.

Q. Did you discuss the plan that you hold in

(Testimony of P. G. Denson.)

your hand with Charles Mapes, one of the defendants?

A. I wouldn't say that I discussed it with Charles but I feel assured that these plans were shown to the builder, Mr. Moorehead and Mr. Slocum.

Q. But you are not certain that they were shown to Charles W. Mapes?

A. I would not be positive.

Q. Or any other defendant?

A. No.

Q. And they were prepared at your request?

A. They were.

Q. Mr. Denson, have you had any correspondence with the defendant, Charles W. Mapes, Jr.?

A. Yes, some. Not very much; mostly our communications were more or less by phone, but I have received letters from him.

Q. Have you in your possession now any letters received from Charles W. Mapes?

A. I think I have.

Q. You have handed me a letter which you state was received from Charles W. Mapes, dated November 20th, no year date but the envelope containing the letter bears date Reno, Nevada, November 21, 4:30 p. m., 1945, and another letter dated Monday, December 3rd, enclosed in an envelope, the month indicated as December, the day undecipherable but the year 1945. Do these letters both refer to your hotel operations?

Mr. Cooke: I object.

(Testimony of P. G. Denson.)

Mr. Platt: Well, I am trying to lay foundation for their introduction.

Mr. Cooke: That is not the way to do it, get the contents in before the offer.

The Court: He may answer this question.

A. What is the question?

Q. Do these letters refer to your hotel operations?

A. About what is going on over here in Reno in regard to the building and also in regard to my wishes, if I was getting my sale through satisfactorily, and things in general.

Mr. Cooke: I move that be stricken, contents of a written document.

The Court: It may go out.

Q. I want to ask you again, Mr. Denson, do those letters refer to your contractual relations with the defendants in this case, with respect to the management of the hotel contemplated in Reno?

Mr. Cooke: I repeat the objection. [261]

The Court: Objection will be sustained.

Q. Well, to what do these letters refer?

Mr. Cooke: Object. They show for themselves.

The Court: Same ruling, objection sustained.

Q. Do you know the handwriting of Charles W. Mapes?

A. I do.

Q. I hand you a letter dated November 20th and ask you whether that is his handwriting?

A. It is.

(Testimony of P. G. Denson.)

Q. I show you a letter dated December 3rd and ask you to testify whether that is his handwriting?

A. It is.

Mr. Platt: We offer them in evidence, your Honor.

Mr. Cooke: Mr. Platt, are you offering both of these as one exhibit or separately, the two letters?

Mr. Platt: I think it might save the record to offer as one exhibit.

The Court: Would you have a different objection to make to one than the other?

Mr. Cooke: No, the same objection would apply. The defendants object to the admission in evidence of the two letters referred to in the offer on the ground that they are irrevelant and immaterial and contain nothing of fundamental value in the case, tend to prove no issue in the case. They purport to be letters written by Charles W. Mapes to Mr. Denson as to condition of the building, progressing, and difficulties met with in regard to the purchase of the 12 feet, and similar matters.

Mr. Platt: If the Court please, the purpose of the offered exhibits is to establish some of the allegations of the complaint, or to put it another way—the letters have bearing upon evidentiary value in support of some of the allegations of the complaint. The complaint alleges that the plaintiff was led on to believe, by words, act and conduct on the part of the defendants, that the lease would be granted and these letters are indications of the fact that the defendants were cooperating clear up to December,

(Testimony of P. G. Denson.)

1945, two months after the contract was signed, in complimenting the plaintiff and keeping under cordial relations with him and indicating through correspondence that the contract or lease would ultimately be granted. They are also introduced for another purpose, and that is to tend to establish the allegations of the complaint that the time element in the contract has been waived. The letters indicate that they are still conversing, they are still corresponding, they are still negotiating, toward carrying out the essential and important elements of the contract and the letters strongly indicate that. We have also alleged in the complaint that one of the acts showing a conduct and attitude of the defendants toward this plaintiff and evidencing waiver of the time element and likewise establishing by word, act, and conduct their intention to carry out their agreement, we allege in the complaint that they caused to be published in both of the local newspapers a cut or drawing of the proposed building, with an article mentioning Mr. Denson, the plaintiff here, as one of the managers at least of the hotel and one of these letters refers to that fact, that these cuts and drawings or articles or something will be sent to Mr. Denson. And we feel, if the Court please, that these letters have evidentiary bearing upon these particular and essential elements of the complaint.

Mr. Sinai: May I suggest further to the Court that the letters also show that Mr. Mapes was cognizant of the fact that Mr. Denson sold his hotel, or

(Testimony of P. G. Denson.)

was in the process of selling his hotel in Visalia, California, as also alleged in the complaint, preliminary to taking charge, or in the process of taking charge of the hotel property here and is an important matter in setting up the partial performance.

The Court: The exhibit may be admitted in evidence as Exhibit H, the two letters as one exhibit. We might as well take our noon recess before we launch out on another branch.

Mr. Platt: May I reserve the right to request the letters be read into the record?

The Court: Yes, you may read the letters.

(Recess taken at 12:00 noon.) [264]

Afternoon Session — 2 P. M.

October 29, 1946

MR. DENSON

resumed the witness stand, on further direct examination by Mr. Platt.

Mr. Platt: With your Honor's permission, I would like to read those letters into the record.

The Court: Yes.

Mr. Platt: Letter dated November 20th (reads from Exhibit H.) The next is dated Monday, December 3rd (reads from exhibit H.)

Q. Mr. Denson, do you know what Charles was referring when he mentioned that he hoped your sale was progressing?

A. Oh, yes.

(Testimony of P. G. Denson.)

Q. To what?

A. He knew that I was selling the hotel down there.

Q. Down where?

A. At Visalia, California.

Q. What did you tell him, if at all, your reason for selling it?

A. So I could put all of my time to the Reno hotel here in Reno.

Q. Do you recall about when you did sell it?

A. I sold the hotel just a few days after my contract was signed but the deal was not closed until the first day of January, 1946, due to the fact that the owner of the building was in Honolulu and the papers had to be redrafted over there by their attorneys.

Q. Did you sell at a sacrifice or not?

A. I would consider that I did.

Q. Do you recall discussing with Mrs. Mapes at any time the question of a loan for and on her behalf?

A. Yes.

Q. And do you remember when the discussion took place?

A. We had talked of the loan in September of 1945.

Q. Was that before or after the contract was signed, if you remember?

A. Just before it was signed, some two or three days before.

(Testimony of P. G. Denson.)

Q. And where did the conversation take place?

A. In Mrs. Mapes' residence.

Q. Do you remember what you said and what she said?

A. Well——

Mr. Cooke: (Interrupting) The question is, do you remember?

A. Yes, I remember the thing.

Q. Well, state as nearly as you recall what was said by both of you.

Mr. Cooke: The defendant objects on the ground it is incompetent, immaterial and irrelevant to any issue in the case, that it has to do with the conversation in the nature of negotiations prior to the making of the alleged contract that is in issue in this case; that all those negotiations are conclusively merged in that contract and evidence thereof is not relevant. We object on the further ground that it can not constitute any part performance because at the time it was had there was nothing to perform, there wasn't any agreement existing, that part performance can only refer to things that occur in the making of an agreement to which it is supposed to be performance or part performance. We object to it on the further ground that it is irrelevant and immaterial as to whether he secured a loan or not. There is no claim made anywhere in the case that that was pursuant to any contract or agreement or even request of Mrs. Mapes. I think I would like to have added also the objections I have heretofore made which might, for convenience, be termed a

(Testimony of P. G. Denson.)

general objection as to the admissibility of this evidence and as stated to Exhibits D, F, and G, if I remember rightly. I think that will suffice for the purpose of this objection as to the former objections.

The Court: The former objections will be deemed applicable to this offer and that form of objections, with the present ones, will be overruled. I understand this conversation was when?

Mr. Platt: On September 21, 1945.

The Court: Objection will be overruled.

Q. I think the last question I asked you, Mr. Denson, was to state what was said, as nearly as you recall. [267]

A. Mrs. Mapes and I had discussed my interviewing Mr. Al Gock.

Q. Who is Al Gock?

A. President of the Bank of America. He succeeded Mr. Giannini of the Bank of America, the chairman of the board, and Mrs. Mapes—we had talked of the contract; in fact, I informed her that I wouldn't interview Mr. Gock or try to see anything about a loan unless I had a contract, something to show him I was going to be one of the operators and one of the owners of the lease and the contract was mailed to me at Los Angeles because I returned there——

Mr. Cooke: (interrupting) That is not stating what was said.

The Court: That part may go out.

Q. Then what else was said by you or Mrs. Mapes during that interview?

(Testimony of P. G. Denson.)

A. Mrs. Mapes was rather anxious for me to discuss the whole——

Mr. Cooke: (interrupting) Move that be stricken as not responsive to the question.

The Court: It may go out.

Q. Will you state as nearly as you recall what was said?

A. Mrs. Mapes asked me to call on Mr. Gock to see in regard to the loan for the building.

Q. Did you later do that?

A. I did.

Q. Did you report what you did to Mrs. Mapes?

A. After I interviewed Mr. Gock, Mr. Moorehead and I called on Mr. Dwight Park, who is president of the Occidental Life Insurance Company at 8th and Spring, and that was either the 27th or 28th of September, about one of those days.

Q. Did you report the visit to Mr. Gock and the insurance company to Mrs. Mapes later?

A. We did.

Q. In what manner did you report it to Mrs. Mapes and about when?

A. I went—after I left the Occidental Life Insurance Company, if I remember correctly, Mr. Moorehead and I had lunch and returned to the Biltmore Hotel and I phoned Mrs. Mapes and as I remember Mr. Moorehead also talked to Mrs. Mapes on the phone.

Q. What did you tell Mrs. Mapes on the phone?

A. I told Mrs. Mapes I felt sure we would get

(Testimony of P. G. Denson.)

the loan; Mr. Park was very favorable of it and in fact assured me the loan would be made for the amount asked for.

Q. Do you recall what Mrs. Mapes said to you over the phone in reply?

A. Well, she felt I would be successful in getting it through Mr. Gock.

Q. In the letter of December 3rd from Charles to you, introduced in evidence here, there is mention of the fact to the [269] effect that his mother would send you the newspaper articles. Did she later send them?

A. Yes, I received them.

Q. Have you them now?

A. I have.

Q. I wish you would produce them. One is an article in December 3, 1945, issue of the Reno Evening Gazette and the other is an article of December 2, 1945, issue of the Nevada State Journal. We offer them in evidence.

Mr. Cooke: The defendants object to the admission in evidence of the article referred to in the Reno Evening Gazette, appearing under date line of December 3, 1945, on the ground that the matter is irrelevant and immaterial on evidence of any new or different contract than the document of September 24, 1945; that there is nothing in the article as published that constitutes the basis of any part-performance agreement or arrangement; that it merely purports to be a picture of the hotel as proposed, the article attached to it or following it, explanatory of it, states something about the Reno workmen commencing the work and that the hotel

(Testimony of P. G. Denson.)

will be furnished by the firm of Charles W. Mapes, Jr., and Peter G. Denson, who have been active in the hotel business for nearly thirty years, and so on. My principal objection to it is that it is encumbering the record with material of irrelevant matter. That applies to the article in the Nevada State Journal of [270] December 2, 1945, which is principally the same type of article and the print is just substantially the same as this in the evening paper, the evening edition. I wish to add to the objection already stated the general objection that a court cannot decree specific performance upon fragmentary, irrelevant, collateral matter of this sort, that it is simply one of the things that occur, there is nothing in it that is important, nothing in it to constitute basis of part performance in the face of the statute, and if that is true, then we are relegated to the Exhibit C, which is the contract of September 24, 1945.

The Court: The reason for overruling the objection and reason for permitting this evidence and other evidence of the same nature is that it might, from what it contains, go to support the theory of waiver of the time performance of the contract. That is my idea in permitting admission of this testimony.

Mr. Platt: I might add, if your Honor will permit the interruption, that another reason for our introducing it is that it is tacit recognition by the parties of the first part of the continued existence

(Testimony of P. G. Denson.)

of the contract on the date and days of the publication.

The Court: That is probably a better way of stating the same thought I had in mind. [271]

Mr. Platt: No, I think not, but it is the same idea.

The Court: Well, the objection will be overruled. It will be admitted in evidence, the two articles, both admitted in evidence as Exhibit I.

Mr. Platt: I would like to read the articles into the record, your Honor.

The Court: You may do so.

Mr. Platt: (Reads article from Reno Evening Gazette (Exhibit I).) This article is very much the same, your Honor, but if your Honor will indulge me, I would like to have it in the record.

The Court: Yes, just go right ahead.

Mr. Platt: (Reads article from Nevada State Journal Exhibit I.)

Q. I hand you, Mr. Denson, what purports to be publications, one Keeler's Review, dated March, 1946, the other Western Hotel & Restaurant Reporter, March, 1946, and the third Western Hotel Reporter dated December, 1945. State whether there are any articles in any or all of those publications published with the joint knowledge and request of you and Mrs. Mapes or you and Charles Mapes and Mrs. Mapes? A. They were.

Q. And when was that request made, as nearly as you recall?

A. Well, we had talked of that right along, about

(Testimony of P. G. Denson.)

giving some publicity to the hotel as soon as we possibly could, but [272] we didn't want to give out any news, at least they didn't—that was the excuse—until the actual time to go ahead with it and it first came out in the December issue of 1945 with a picture and write-up similar to the one you just read, which is in the December issue, page 4. I submit that one. These other two hotel magazines is one page 6 of the March issue, the write-up of the hotel in regard that we were seeking a name for the hotel, which we had talked of considerably in regard to a name most proper and a short name that we had suggested a cash prize and wanted to have a little contest here in Reno, there was the discussion of it in regard to the name, to have a contest and pick the name, and spoke of giving a cash prize.

Q. You mean you discussed all that with Mrs. Mapes?

A. With Mrs. Mapes and Charles and on page 6 of this Western Hotel Reporter of this March issue is in regard to the name. In the Keeler's Hotel & Restaurant Review, on page 47, there was also the cut and picture run in this magazine and also topped off with wanting a name for the hotel. That is the March issue 1946 and page 47.

Q. Do you know whether Mrs. Mapes or Charles or both of them had any knowledge of these pictures?

A. Oh yes.

Q. How did they get that knowledge?

A. Well, they knew that I was waiting for this

(Testimony of P. G. Denson.)

information [273] in regard to the hotel in order to have it published. The first picture in the Keeler Hotel Review, if I am not mistaken, I think Mr. Moorehead furnished the cut of the picture for that. That is my understanding, but I could be mistaken on it.

Q. Do you know who furnished the cuts for—

A. (Interrupting): I had some cuts made myself but I think Mr. S. D. Parrish received the first cut from Mr. Moorehead. I won't be positive but I think that is it.

Mr. Platt: We offer these in evidence for the same reason that we offered the Journal and Gazette copies.

Mr. Cooke: The defendants object to the admission in evidence of the three magazines with the articles indicated by the witness, one occurring on page 47 of Volume 69 of the Keeper Pacific Hotel Review magazine, and another article appearing on page 4 of the December issue of Western Hotel and Western Reporter, and the other one appearing on page 6 of the March, 1946, issue of the Western Hotel & Restaurant Reporter. The objection is upon the ground that this is an action for specific performance, based upon the execution of an agreement, or alleged agreement, dated September 24, 1945, and which the plaintiff alleges in his complaint is complete and certain and definite in all its parts, that—

Mr. Platt: (Interrupting): I think I ought to correct counsel there, if your Honor will permit.

(Testimony of P. G. Denson.)

The allegation [274] is that the contract is definite and certain in all its material and essential parts.

Mr. Cooke: Counsel may be right; but I do not think that that makes any difference, to make the interruption.

Mr. Platt: Well, I beg your pardon for interrupting.

Mr. Cooke: The documents offered in evidence are stated to be for one purpose at least, of showing a waiver of the conditions of the written agreement. No waiver is pleaded in the complaint, no legal plea of any waiver and which requires——

Mr. Platt (interrupting): I am afraid, if your Honor please, I am almost forced to interrupt counsel now because waiver and estoppel is specifically pleaded in the complaint.

Mr. Cooke: Well, I say they are not, with all deference to my friend over here.

The Court: Just make the objection the way you would like to have it, Mr. Cooke.

Mr. Cooke: Well, I am interrupted and have to meet the objection. You can't plead by saying some one estopped and waived something. There is no waiver pleaded, therefore, it can't be admissible in evidence by way of proving waiver. In order to be a waiver, there has to be a consideration for changing of the agreement and there is no consideration shown here for any change of agreement in any respect, nor is there [275] any plea of any consideration. The written agreement, to add possibly to

(Testimony of P. G. Denson.)

the grounds of the objection—the objection is on the further ground that the written agreement cannot be changed or supplemented by fragmentary and loose, disconnected, desultory articles, such as this, that are published in the paper. They are published in the paper by Mr. Denson. It is true that he has testified that the other parties knew of the publication, but unless they authorized the publication, I don't think that the mere knowledge that they had that he was publishing these articles would constitute any estoppel or waiver. The point is that material of this sort, if allowed to go into evidence to show a waiver or show a change of conditions of a contract, would be subject to the objection that it would be making a new contract. If your Honor will allow this in and then learns that the contract was changed, then you have a contract parole in writing and by law parole evidence to explain something, we submit, cannot be done under the statute, which requires these contracts with reference to real property to be in writing and signed. The objection also is to this material here which appears to be on its face nothing but some voluntary statements made by Mr. Denson to the newspaper people, in which his name is set forth about his business and society and so on. How that can possibly constitute any waiver or estoppel as to the Mapes is certainly not clear to me. There is no duty rested upon them to be chasing him around and see that he did not publish something about them they did not want. He could publish anything he wanted about the

(Testimony of P. G. Denson.)

building, claim he was sole manager, but the mere fact they knew he published these things does not make it their articles. It isn't them speaking, it is Mr. Denson speaking. So we stand on the objection and also the general objection heretofore made, that it is an attempt to alter by parole evidence the conditions of a written document.

The Court: I think there is evidence here from Mr. Denson to the effect that these articles were published with the full knowledge before publication of Mrs. Mapes and Mr. Charles Mapes. The objection will be overruled and the exhibits may be admitted in evidence as Exhibit J.

Q. Mr. Denson, do you know of your own knowledge how Mrs. Mapes and Charles got the information about your career, let me say, that was published in all of these publications? A. Yes.

Q. How did they get it?

A. In regard to myself, my own background, I sent that to them.

Q. Sent that to whom?

A. I think Mrs. Mapes or Charles. I can't just remember which it was.

Q. How did you happen to send it? [277]

A. They wanted it for the paper over here and we had discussed the issues in the magazines for some time, but it was against their wishes that any news should get out in regard to it until the actual starting of construction. That is why we didn't get more publicity than that.

(Testimony of P. G. Denson.)

Q. Now any time since the signing of the agreement in evidence and in controversy here by all the parties to it, has Mrs. Mapes or her attorney or anybody for or on her behalf ever tendered to you a form of lease embodying the essential terms of the contract? A. Absolutely not.

Mr. Cooke: We object on the grounds there is no obligation for the tender of a lease, nor any obligation on Mr. Denson to tender a lease to us.

The Court: Objection overruled. Answer the question.

A. Absolutely not. Not even mentioned the lease to me after that, never submitted me anything.

Mr. Cooke: The question is answered. I move to strike out the other.

Mr. Platt: I think the answer amplified and I think it is proper.

The Court: The latter part may go out. He stated it was never tendered.

Q. Did Mrs. Mapes or Charles or their attorney or anybody for or on their behalf ever seek an interview or a conference [278] with you to draw up a lease? A. Absolutely not.

Q. Have you always been ready and willing to enter into a lease with them in accordance with the terms, conditions and covenants of the agreement?

Mr. Cooke: Objected to as leading.

A. I have.

Mr. Cooke: I move to strike the answer. I would like to state my objection.

(Testimony of P. G. Denson.)

The Court: The answer may go out and state your objection.

Mr. Cooke: I object to it as leading. I do not think this witness needs any leading from anybody.

The Court: Objection overruled. Answer the question.

(Question read.)

A. I have.

Q. And are you now ready and willing?

A. I am.

Mr. Cooke: Same objection.

The Court: The answer may be stricken and and make your objection.

Mr. Cooke: Same objection, your Honor.

The Court: Same ruling. Overruled.

A. I am.

Q. Ever since the signing of the agreement in evidence here [279] have you been able to perform all the conditions, terms and covenants of it?

A. Absolutely I have.

Q. And from the time of the signing of the agreement up to the present time and at the present time, are you able to perform? A. I am.

Mr. Platt: If your Honor please, I may want to recall this witness on direct examination for further questions.

The Court: If you desire you may later on.

Mr. Platt: But for the present the defense may cross-examine.

(Short recess.)

(Testimony of P. G. Denson.)

Mr. Denson resumed the witness stand.

Mr. Platt: Your Honor please, there are a few more questions occurred to me on direct examination.

The Court: All right, go ahead.

Q. Mr. Denson, did you see either Mrs. Mapes or Charles or Mr. Cooke in Reno, Nevada, early in April, 1946? A. I saw——

Q. (Interrupting): Just answer the question.

A. Yes, I did.

Q. When and where did you see them?

A. I saw Mrs. Mapes and Charles at Mrs. Mapes' residence on the morning of April 10th of this year, 1946. [280]

Q. Did you have a conversation with them?

A. I did.

Q. And state as clearly as you recall what the conversation was.

A. I came to Reno to see Mrs. Mapes and Charles. This was after my meeting of April 1st in San Francisco, at the request of Charles. I arrived here on April 9th, phoned Charles, made an appointment with him for 10:00 o'clock the next morning at Mrs. Mapes' residence. I arrived there at ten, Charles was there, his uncle was there, Mr. Hart, Mrs. Mapes was probably some 45 minutes late in getting there. She was not home. We waited for her to arrive. After she arrived I informed her, told her what Charles had told me in San Francisco in regard——

(Testimony of P. G. Denson.)

Q. (Interrupting): What did you tell her?

A. I told her Charles had met with me in San Francisco and informed me that we were not going to have the sky room, they had big offers for it. This Mrs. Mapes immediately denied and asked Charles, "Why did you tell him that?" and Charles denied all the conversation he had with me in San Francisco in regard to the sky room. I insisted on telling Mrs. Mapes what had taken place in San Francisco and I turned to Charles and asked him just why I was over here, what he wanted to do. He said, "Mr. Denson, I am not going through with the deal." I informed Charles he was making a mistake and if he didn't want to go through with it, I would carry out the deal myself [281] as I first planned. He said, "That is up to you and mother." I turned to Mrs. Mapes. I said, "You have heard what Charles has to say about it. What do you want to do?" Mrs. Mapes remarked, "Mr. Denson, you and Charles had better go down and see Mr. Cooke and get it straightened out." I mentioned to Charles it was only quarter after eleven, we could probably see Mr. Cooke before he went to lunch. He said all right. I am not positive there was a highball served before we left for Mr. Cooke's office. Charles and his uncle and I got in his car and we started for Mr. Cooke's office. We got near the El Cortez Hotel and Charles said he wanted to go in and phone. He came back and informed me Mr. Cooke couldn't see us until three o'clock. He agreed to come back and drive me down to Mr.

(Testimony of P. G. Denson.)

Cooke's office. We arrived there about three o'clock. I informed Mr. Cooke what had taken place and what Charles had said and Charles had refused to go through with the deal, so I was here ready and willing and our contract called for \$20,000 deposit and I had paid my ten thousand, I was ready to give another check for another ten. It was on a Los Angeles bank but I would have the local bank OK the check. Mr. Cooke informed me Mrs. Mapes wouldn't let me have the lease alone. I informed Mr. Cooke, all right, if she had some other hotel man suitable to me I would agree. Mr. Cooke said, "Mr. Denson, Mrs. Mapes made it very plain she wouldn't let you have an interest at all." I informed Mr. Cooke he couldn't [282] represent Mrs. Mapes' interests and mine too, so therefore I would have to get an attorney. Mr. Cooke asked me if it would be a Reno attorney. I informed him my attorney was Harry Young of San Francisco but I would leave that to Mr. Young in regard to getting counsel in Reno locally. Mr. Cooke asked me if I would have Mr. Young communicate with him in regard to it. This I did, but Mr. Young did not write to Mr. Cooke direct. First he wrote to Mrs. Mapes, but I had delivered Mr. Cooke's request and I have, I think, a copy of Mr. Cooke's letter back to Mr. Young in regard to the deal. So I went back by stage that evening to Sacramento, picked up my car there the next morning and drove from there, phoned Mr. Moorehead from around about Richmond, made an appointment with him for lunch,

(Testimony of P. G. Denson.)

said I might be a little late but wanted to see him. I informed him what had taken place.

Q. As I understand your testimony, Mr. Denson, on yesterday you testified that you and Mr. Moorehead and the Mapes conferred at different times with respect to the plans of the hotel and likewise the plans for furnishing and equipping it?

A. That is true.

Q. Now did those conferences continue or were they stopped?

A. When I first knew I would be refused plans was before I came to Reno on the 9th.

Q. 9th of April you mean? [283]

A. 9th of April of this year. Mr. Moorehead, I feel sure, in fact he told me, also Charles told me, that Mr. Moorehead was coming to Reno with him the next day, on the 2nd. I came up here to San Francisco by plane and went back by plane on the 2nd and the 4th or 5th I returned to San Francisco, then went to Mr. Moorehead's office and that is when Mr. Moorehead informed me that Charles had instructed him not to give me any more plans. That was before I came over here on the 9th. He said he hoped I wouldn't ask him for a set of plans, but I have asked him for a set of plans since then.

Q. But you have never seen them?

A. But I was refused the detailed drawings.

Mr. Platt: I think that is all for the present.

The Court: You may cross-examine.

(Testimony of P. G. Denson.)

Cross-Examination

By Mr. Furrh:

Q. Mr. Denson, you have testified that your first contact with Mrs. Mapes was in 1940, is that correct?

A. That is correct.

Q. Was it on that occasion that you suggested to her the proposition of erecting a hotel on this particular lot where the hotel is now being constructed?

A. I didn't suggest that she build a hotel.

Q. What was——

A. (Interrupting) I had been informed she wanted to build a [284] hotel and was interviewing her in regard to it.

Q. Did she tell you on that occasion that that site had been acquired by her deceased husband for the purpose of erecting a hotel?

A. That I don't remember, whether she told me that or not. I made that suggestion to Mrs. Mapes last year that we would——

Q. (Interrupting) I am talking about the conversation you had with her in 1940.

A. I don't remember any such conversation that her husband had acquired the property to build a hotel. Mrs. Mapes informed me they acquired the property to know what was going to be built there to protect the other properties across the street or near there somewhere.

Q. Didn't you suggest to her that she lease the hotel if one were constructed?

(Testimony of P. G. Denson.)

A. Not exactly to me. Rather between Mr. Leon Huckins and myself.

Q. What date are you talking about?

A. I am talking about 1940 that you just spoke of.

Q. Isn't it true that *Mr.* Mapes told you that it was her plan to erect a hotel which was to be leased exclusively to her son, Charles W. Mapes, Jr.?

A. Never heard of her son being interested in a hotel until 1944, until Mr. Moorehead informed me Mrs. Mapes would probably like to have Charles interested in the hotel. That goes [285] back six years, you know.

Q. That is 1940? A. Yes, 1940.

Q. When was the first time that anything was said about Charles being interested in the operation?

A. I wouldn't say just what month it was in 1944, but I do know it was before September of 1944. It might have been May or June. Mr. Moorehead could give you that information.

Q. Mr. Denson, isn't it true that when that subject was first discussed with Mrs. Mapes that she told you that it was her plan to erect this hotel for her son? A. Are you talking about——

Q. 1944. A. 1944?

Q. Yes.

A. She did not. Mrs. Mapes had talked to me in 1940 in regard to Charles, he was going to study law.

Mr. Furrh: I move that be stricken as not responsive to the question.

The Court: He can explain his answer.

(Testimony of P. G. Denson.)

Mr. Platt: What did you say, so the reporter will get it?

A. I was always under the impression that Charles was going to study law. I didn't know he was interested in the hotel business and I had been informed that by Mrs. Mapes, that that [286] was what Charles would probably take up, was law. The first I knew he wanted to be interested in the hotel business was when Mr. Moorehead spoke to me in 1944 and I know it was before September because if I remember right September, 1944, is the first time I met Charles.

Mr. Cooke: I move to strike that as not an explanation.

The Court: Motion denied.

Q. Mr. Denson, on what occasion was the proposed association between you and Charles Mapes, Jr., first discussed?

A. I didn't quite get your question.

Q. I say on what particular occasion was the proposed association between you and Charles Mapes, Jr., first discussed?

A. You mean between Charles and myself?

Q. Yes.

A. We talked of it in September and then——

Mr. Platt: What year?

A. 1944.

Q. Prior to the time that you talked to Charles in 1944, had you and Mrs. Mapes not discussed the possibility of you and Charles being associated in the operation of the hotel?

(Testimony of P. G. Denson.)

A. Well, just before I met Charles I was over here in September, Mrs. Mapes and I discussed Charles then and I waited at her home to meet Charles. He came in by plane that evening. And if I remember correctly, that was the first time I met [287] Charles.

Q. Was there any discussion had as to the basis upon which you and Charles would operate the hotel?

A. No, there was not. It was understood in general that I was to be manager of the operation for a specified time.

Mr. Furrh: Your Honor, I move the answer be stricken as not responsive to the question.

(Question and answer read.)

The Court: Motion denied:

Q. Mr. Denson, when was the first time any discussion was had between you and Charles as to a percentage basis for the working out of your association in connection with the operation of the hotel?

A. Well, Charles and I when we discussed the deal, in regard to about he and I, when he first informed me*that he wanted to be 50-50 on this deal with me, they already knew the percentage of what we working on. Mr. Moorehead had presented that to them because I had taken that up with Mr. Moorehead and I feel certain it was first presented to them by him. I could be wrong about that, but that is my best recollection.

(Testimony of P. G. Denson.)

Q. Was there ever discussion between you and Charles or between you and Mrs. Mapes as to a percentage basis of 30 per cent of the net earnings to you and 70 per cent of the net earnings to Charles?

A. No, I wouldn't have been interested in it.

(Question read.)

A. Absolutely not.

Mr. Cooke: I move to strike out the other part of the answer, he wouldn't be interested in it.

The Court: It may go out.

Q. Mr. Denson, you have testified as a result of your discussions with Mrs. Mapes and Charles it was generally understood that you were to manage and operate the hotel, is that correct?

A. Yes, that is true.

Q. Now just when was a discussion had as to who would actually manage and operate the hotel?

A. Well, there was—I had discussion——

Q. (Interrupting) Just answer the question.

A. Charles and I—I would say it was around in September—in August, when we all met there, either I would say the 16th or 17th, Charles and I discussed, as I mentioned before, in regards to the deal and I informed Charles that I would like to be the managing operator for a certain specified time, until he had more experience.

Q. Was that discussion only between you and Charles? A. Just between Charles and I.

Q. And that was in August of 1944?

A. 1945.

(Testimony of P. G. Denson.)

Q. And where did that conversation take place?

A. The mezzanine of the Sir Francis Drake Hotel in San Francisco.

Q. Was any other discussion ever had in which the question was taken up as to your managing and operating the hotel?

A. No, I can't say there was because in fact, when Charles and I had this meeting, Charles said he expected that. I told him I wasn't looking for any publicity for myself and I wouldn't ask for it to be on the hotel letterheads or our stationery.

Q. Mr. Denson, isn't it correct that for some time prior to the date that this agreement of September 24, 1945, was signed, that you were very insistently urging Mrs. Mapes to sign some type of memorandum regarding the proposed lease, in order that you would have a writing to show?

A. I wasn't asking in the way of memorandum. I was asking for a contract for Charles and myself and Charles phoned me after the meeting in Sacramento and said, "Let's go over and get our contract signed up with mother." That I did. That was in September of 1945, Friday I think it was, the 21st. Those dates can be checked though.

Q. Didn't you tell Mrs. Mapes on several occasions that you were very anxious to have a written instrument of some kind that you might show to individuals whom you wanted to know that you were interested in this particular hotel?

A. Why no. [290]

Q. Isn't it true, Mr. Denson, that at the time

(Testimony of P. G. Denson.)

you were in Mr. Cooke's office on the occasion on which this instrument of September 24, 1945 was signed, that you stated at that time you were very anxious to have some kind of an instrument in order that you might show it?

A. I wasn't in Mr. Cooke's office on September 24, 1945.

Q. What was the date you signed the contract?

A. It was October 4th.

Q. Well, let me ask you this, Mr. Denson: Isn't it true that on October 4, 1945, at the time you were in Mr. Cooke's office you stated that you were anxious to have some kind of a written instrument which you could show?

A. No, no, because the contract had been signed by Mrs. Mapes. We met there to sign the contract, all of us.

Q. Didn't you make that statement while the instrument was being prepared?

A. Why certainly not. The contract had already been signed by Mrs. Mapes. I went there for everybody to sign it, Charles and myself and Mrs. Mapes. and also initial the corrections I had inserted in regard to the income about the entire building.

Q. Mr. Denson, when did you first become acquainted with Mr. Cooke?

A. I first met Mr. Cooke at Mrs. Mapes home, I would say September 23, 1945. I had never met him before to my knowledge. [291]

Q. Do you remember what day that was on?

(Testimony of P. G. Denson.)

A. That was on Sunday afternoon, approximately four o'clock in the afternoon.

Q. How did it happen that you met Mr. Cooke on that day?

A. Mrs. Mapes knew that Charles and I were coming to Reno in order to have the contract signed up. We talked a lot and I had brought over and prepared a document which was very much the same as Mr. Cooke had prepared. We talked Friday evening and Mrs. Mapes said, "We will get together tomorrow morning." She and Charles and I tried to get together on Saturday morning, but I was put off and put off. We talked about it. Mrs. Mapes had asked me—I was their house guest—she had asked me to stay over and meet some of her friends on that Saturday evening. I finally agreed to do it but I felt I should be back to my business. Mrs. Mapes and I took a ride and talked over everything in general about the hotel that Saturday morning. That Saturday afternoon Gloria, Charles, and Charles' girl friend, I forget her name, the four of us went to the football game. That evening Mrs. Mapes entertained us at her home and we all went out to dinner together. Then on Sunday morning we tried to get together several different times. Finally Charles told his mother, "Well, mother, Mr. Denson is right, we should get the contract ready between us." I had mentioned to Mrs. Mapes that we couldn't go ahead unless we had a contract between us, also Mrs. Mapes was anxious for me, [292] as I stated before to try and endeavor to secure a loan through Mr.

(Testimony of P. G. Denson.)

Al Gock's office, the Occidental Life Insurance Company, through it, and I refused to take it up with Mr. Gock until I had my contract. Let me state where they first knew about Mr. Gock.

Mr. Furrh: Just a minute. I ask that that portion of the answer be stricken as not responsive to the question. I would like to have the reporter read the question.

(Question and answer read.)

A. Either Mrs. Mapes phoned or Charles, but I think Mrs. Mapes phoned to Mr. Cooke to please come down to the house, which he did and he was there, I presume—anyway, he was asked to stay for dinner, but he didn't.

Q. Did you have a discussion while Mr. Cooke was there? A. We certainly did.

Q. Who all was present?

A. I feel positive Charles was also there but they say he wasn't but Mrs. Mapes and I were there, but Charles was fully familiar with regard to what Mr. Cooke was coming for. I will state, if you like, why they sent for him.

Q. I would like to have you tell us first what took place at this conversation on that particular Sunday afternoon when you and Mr. Cooke and Mrs. Mapes were present, and I believe you said you thought Charles.

A. I feel positive Charles was present. [293]

Q. Just tell us the nature of the discussion and what actually took place at that time.

A. It was all in regard to the agreement that

(Testimony of P. G. Denson.)

I had had there for Mrs. Mapes to sign. She objected very much to the article that was in there in regard to guaranteeing the taxes, the insurance, the upkeep, the interest on borrowed money and also to amortize the loan over a period of years. Mrs. Mapes informed me—that was income from the entire building—she said, “You mean the stores too?” I said, “Mrs. Mapes, everything.” She said, “We will leave that out, just leave that out; that has nothing to do with it at all. Let’s keep straight to the strict percentage deal.” I informed Mrs. Mapes I didn’t want her to feel I was trying to take advantage of her one way or the other and Charles spoke up and said, “Mr. Denson, I don’t think mother quite understands” and I explained to her why that was for her protection, and not only that, it made it look favorable to the insurance company or whoever was making the loan, that that was to be taken care of and a chattel mortgage on the furniture, that the lease was secured by the chattel mortgage on the furniture and if you didn’t live up to the agreement, naturally you would lose this furniture. Well, she sent for Mr. Cooke and when Mr. Cooke arrived I explained to Mr. Cooke what Mrs. Mapes’ objection was and he wanted to redraft it. I said, “You can redraft it, yes, but I am going back tonight. If you want to redraft and send it down to me [294] or mail it special to Los Angeles and I won’t sign up Mrs. Mapes before I go. She doesn’t want that article in there so leave it out.” Well, I received the document—

(Testimony of P. G. Denson.)

Q. (Interrupting) Is this conversation you are relating that took place Sunday afternoon?

A. All Sunday afternoon, the 23rd of September, 1945, in Mrs. Mapes' home.

Q. Is that everything that took place on that occasion as you recall?

A. Mr. Cooke agreed to redraft it the next day and mail it to me and they assured me it would be mailed and Mr. Cooke was invited to stay for dinner but I feel certain that he didn't stay.

Q. Did you, during the course of that conversation, produce this proposed contract?

A. Oh yes, I had that.

Q. It was used as a basis for discussion in this matter?

A. It was because the terms of the lease and the contract was stipulated in there, specifically stated everything, the life and also the percentage, 20-year lease and percentage of each department that we were to have in our contract, which consisted of the hotel part, the coffee shop and dining room, cocktail lounge, mezzanine floor and for the rooms and also for the sky room, each one specifically stated in that document. [295]

Q. Mr. Denson, did you have any other discussion after that with Mr. Cooke concerning this proposed contract?

A. The contract was prepared by Mr. Cooke, at least it was on his letterhead or forms, heading with his name, anyway it was his document and witnessed by him. They mailed it to me at Los

(Testimony of P. G. Denson.)

Angeles and then later I phoned Mr. Moorehead and met Mr. Moorehead and we endeavored to carry out what I was supposed to be there for, the business I was there for. Then I returned to Reno on the 3rd of October and saw Mr. Cooke in his office on the 4th of October, when I made the deposit and signed the agreement. The agreement sent down to me was only signed by Mrs. Mapes and witnessed by Mr. Cooke and I think his secretary. It speaks for itself.

Q. Did you have any discussions the following September 23rd—I am referring to the Sunday at which you were present in Mrs. Mapes' home, with Mr. Cooke, Mrs. Mapes and Charles? Did you have any discussions the following day?

A. I wasn't there the following day. I wasn't there on the 24th. I drove back to Sacramento that night, left Sacramento early next morning, went into Visalia, went into Los Angeles on the 24th and received it on the 25th.

Q. Mr. Denson, you have testified that on September 23rd, which was a Sunday, that you were at Mrs. Mapes' home, that you brought an agreement with you which was used as a basis for discussion, is that correct? [296]

A. Yes, I gave a copy of it to Mr. Cooke.

Q. I will show you this document and with the exception of the pencil notations and the sheets which are clipped, will ask you if that is the document which you have referred to?

A. That is it.

(Testimony of P. G. Denson.)

Q. That is the document?

A. I feel positive it is.

Q. You notice the document contains numerous pencilled notations thereon.

A. Oh yes, but I didn't do that.

Q. Do you know who made those?

A. I couldn't tell you.

Q. You weren't present when those were made?

A. No.

Q. Mr. Denson, isn't it a fact that on the Monday following the conversation which you just related as having taken place at Mrs. Mapes' home, when Mr. Cooke, Mrs. Mapes and Charles were present, that you and Mrs. Mapes came to Mr. Cooke's office; at that time you produced this document and stated that it was a form which was commonly used by hotel men in this type of transaction?

A. Are you mentioning the 24th?

Q. Yes.

A. I wasn't here the 24th. I wasn't in Reno. I can't have been in his office because I left on a Sunday around six or seven o'clock the 23rd. [297]

Q. Did you and Mrs. Mapes ever discuss this document with Mr. Cooke in his office?

A. No, absolutely not.

Q. Mr. Denson, you note that this instrument contains numerous blanks. Were any of these blanks filled in at Mrs. Mapes' home at the time you had the discussion with Mr. Cooke?

A. I do not remember of any blanks being filled in. We discussed what the document was and the

(Testimony of P. G. Denson.)

amount, which was in regard to what I stated before, in regard to the income that would be sufficient to take care of those other things from the entire building. Mr. Cooke might have made some notation. It was discussed in general but the terms of this document were to remain the same, with the exception of that, and I thought that would be the way, but when he sent it to me he had still put that in.

Q. Then it is your testimony that none of these changes which later appeared in the instrument which was signed were made in your presence?

A. You mean these pencil notations?

Q. No, I mean the changes between this document which you identified as being the one that you adduced at the time of your conference with Mr. Cooke and Mrs. Mapes and the document as it was signed?

A. This document I have here, those are the terms and the terms and life of the lease is mentioned there. I did not see [298] this document that you have there from Mr. Cooke any more than just now as you showed me. The one that was signed by everybody was prepared by Mr. Cooke. In fact, there was practically no discussion. We all met and read them over and signed them. The terms of the contract were the same.

Q. In other words, the terms of both the instrument which you stated you adduced and the terms of the contract as signed were substantially the same, is that correct?

(Testimony of P. G. Denson.)

A. Yes, so far as the percentage of the lease and the terms of it for 20 years, and the percentage.

Q. By percentage you mean——

A. I presume it is, but anyway the one that was signed was what we all had in mind and had agreed upon the terms of the document that we used.

Q. Mr. Denson, where did you procure this document which I have just exhibited?

A. I had pencilled out what I had in mind and this was typed in Harry Young's office in San Francisco. I had given the data and prepared the title of it to be copied and Harry Young copied it in his office on that form.

Q. Harry Young——

A. (Interrupting) Is an attorney.

Q. Has he represented you?

A. He has represented me for 26 years. It is the firm of Young, Huchins & Rabinna. It is in the Western Life Building [299] on the corner of Market and Second, on the southwest corner of the building.

Mr. Furrh: Your Honor, I would like to offer in evidence this agreement which is undated and which Mr. Denson has identified as being the proposed contract which was produced at the home of Mrs. Mapes on September 23, 1945.

Mr. Platt: If the Court please, I haven't any objection to it being admitted in evidence, the original document that Mr. Denson submitted to Mr. Cooke, but this document which they produce in the first place has a rider on it in pencil, another

(Testimony of P. G. Denson.)

rider here and another one next to it, two more riders on the last page, and it is full of lead pencil interlineations and until those things are identified, I will have to object.

The Court: Do you offer these riders?

Mr. Furrh: I was offering the document to show the proposed contract which was submitted by Mr. Denson and I asked him——

The Court: (Interrupting) Do you contend those riders were submitted by Mr. Denson?

Mr. Furrh: No sir, he testified the instrument in type was the document he submitted.

The Court: Maybe you had better offer the contract without the riders. Objection will be sustained. [300]

Mr. Cooke: Let it stand for identification.

The Court: Exhibit 1.

Mr. Platt: I understand it is offered for identification?

Mr. Cooke: It is marked for identification.

The Court: Is the offer withdrawn?

Mr. Cooke: Your Honor ruled on it, you sustained the objection.

The Court: In the present form it is sustained, with those riders; otherwise, if excluded, it may be admitted. The record may so show.

Mr. Platt: Otherwise we wouldn't object, your Honor.

Mr. Cooke: It may so show.

The Court: Unless those riders were shown to have been submitted with this printed document

(Testimony of P. G. Denson.)
by Mr. Denson. We will be in recess in this case
until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:00 p.m.) [301]

Wednesday, October 30, 1946, 10:00 A. M.

Attorneys present as at previous session.

MR. DENSON

resumed the witness stand on further cross-examination by Mr. Furrh.

Q. Mr. Denson, you testified that on one occasion, while you were in a conference with Mr. Cooke, that you told him to prepare the lease and you would sign it, is that correct?

A. That is correct, yes.

Q. Where did that conversation take place?

A. In Mr. Cooke's office.

Q. And when did it take place?

A. On the 4th of October, 1945.

Q. And who was present on that occasion?

A. Mrs. Mapes was present, Charles was present, and his secretary might have been there. Anyway, she was in the other room.

Q. Was that in Mr. Cooke's private office?

A. In his private office, yes sir.

Q. Do you remember just what was said on that occasion?

A. If I remember correctly, I think I remarked to Mr. Cooke, "Now the next thing to do is signing the papers. When you prepare the lease, I will be

(Testimony of P. G. Denson.)

ready to sign it." The wording is something like that.

Q. You directed your remarks to Mr. Cooke?

A. To Mr. Cooke, yes.

Q. What did Mr. Cooke say?

A. I can't recall that Mr. Cooke really said anything.

Q. Was anything else said at that time about the signing of the lease?

A. Not that I remember of.

Q. Mr. Denson, you have testified that the only conversation that you had with Mr. Cooke in connection with the preparation of this agreement, which was entered into on September 24, 1945, was a conversation at the home of Mrs. Mapes on September 23rd and then in Mr. Cooke's office on October 4, 1945, is that correct?

A. That is correct, yes. I talked to Mr. Cooke on the 23rd. I am almost positive that is the date. That was a Sunday of last year, the 23rd, in the afternoon. I think it was between four and six o'clock. And the next time I was with Mr. Cooke was on October 4th in his office.

Q. The only time you were in his office was on October 4th?

A. Well, no, I was in his office, if I remember correctly, on another occasion. I believe that was also—I think that was on October 4th also.

Q. Do you remember what was the occasion of your being in his office twice on October 4th,

(Testimony of P. G. Denson.)

A. Yes, I can explain that if you want me to.

Q. Was that before the meeting?

A. On that occasion we were in there it was not in regard to our contract.

Q. It was in regard to other matters?

A. Yes. I will not mention that unless you insist on it.

Q. Just what took place on this other visit that you had with Mr. Cooke?

A. Well, I didn't have any business with Mr. Cooke. I accompanied Mrs. Mapes and Charles over there. I think Mr. Cooke knows what that was and they might not want that brought out. It was not pertaining to me at all. It was something else.

Q. Go ahead and tell us, Mr. Denson, just what took place.

A. All right, you asked for it.

Q. That was in Mr. Cooke's office?

A. That was in Mr. Cooke's office.

Q. Now what I am referring to is what happened in Mr. Cooke's office.

A. Do you want to know why we were there?

Q. What conversation you had with Mr. Cooke.

A. I didn't have any conversation with Mr. Cooke at all. Mrs. Mapes did.

Q. You didn't talk with Mr. Cooke?

A. I was there. I accompanied Mrs. Mapes and Charles. Mrs. Mapes did the talking, a little something I don't think has any bearing on this at all.

Q. Go ahead and relate to us what this conversa-

(Testimony of P. G. Denson.)

tion was between Mrs. Mapes and Mr. Cooke that you heard.

A. All right. Mrs. Mapes and Charles and I had gone to the postoffice address of her tenants that she was very desirous of getting out of there and there was quite a ruckus made over there and this man, he went hysterical, due to the fact that Mrs. Mapes had called him a Jew, and the man was very much excited and screamed and yelled and everything else and told Mrs. Mapes that Jesus Christ was a Jew and if she believed in Jesus Christ she shouldn't say anything about the Jews. Mrs. Mapes was very excited and very much upset and we proceeded over to Mr. Cooke's office for her to tell him that he would have to get him out of there. I think he had already served notice on him. That was the conversation we had in Mr. Cooke's office at that time and I don't think it has any bearing.

Q. Nothing was said at all in regard to this contract?

A. I told you that before you had me tell that.

Q. Mr. Denson, at the time you were in Mr. Cooke's office for the purpose of signing the lease, did Mr. Cooke suggest that inasmuch as it was anticipated that the terms and conditions of this lease would be worked out, there would be no need in going into this preliminary agreement at this time?

A. Mr. Cooke didn't make any such remark at all at no time in his office or in Mrs. Mapes' home

(Testimony of P. G. Denson.)

either. He did not [305] comment on it or make any suggestions in regard to that.

Q. Did you say anything at all in Mr. Cooke's office about wanting this agreement for the purpose of having it available to show?

A. Why no, I certainly did not. Pardon me just a minute—not in his office. In Mrs. Mapes' home I remarked, in regard to the taxes and insurance and the interest on borrowed money that she was supposed to borrow and also to amortize the loan over a period of twenty years, I spoke about that, that I couldn't try to intercede for a loan unless I had a contract myself, they would think I was a poor business man. Those were the correct words that were stated to Mr. Cooke in Mrs. Mapes' home. There was nothing said in Mr. Cooke's office in regard to any preliminary thing at all, nothing, because it wasn't preliminary.

Q. Mr. Denson, you have testified that among the various concerns that you contacted in reference to carrying out the contract in respect to the furniture and obtaining furnishings for the hotel, that you contacted the Dohrmann Hotel Supply Company, is that the correct name?

A. Yes.

Q. On how many occasions did you interview representatives of the Dohrmann Hotel Supply Company?

A. Dohrmann's, that's hard to say. In fact, after I received my contract in September, each and

(Testimony of P. G. Denson.)

every time I was in San Francisco I would always end up there because I was very much interested and I knew there was a lot of work to be done. I have furnished several places.

Q. You don't recall any specific dates that you were conferring with representatives of the Dohrmann Hotel Supply Company?

A. That would be hard for me to say. I couldn't say.

Q. Do you have any idea how much time you spent with representatives of Dohrmann's?

A. That would be hard for me to say. I couldn't in touch with Dohrmann's and they were sending me data all the time in regard to cost sheets. When they first worked up the cost, a rough estimate of what it would cost, that didn't suit me at all and I wanted a breakdown of it. They gave me one total cost. I said I couldn't use that, I have to have something to show Charles, so that we can get competitive bids, compare prices with other companies. They are all familiar with that. They knew what I was doing.

Q. Now, Mr. Denson, you have testified that you contacted the Dohrmann Hotel Supply Company, Barker Bros. and various other concerns with reference to the obtaining of furniture, etc., for the hotel——

A. (Interrupting) I don't think I said various other concerns. I named the ones I had contacted.

Q. That is what I had in mind.

A. Besides Dohrmann and Barker's—wait a

(Testimony of P. G. Denson.)

minute, there was one [307] I didn't mention. I went clear down to Santa Monica to the McMahon Furniture Company to see if they could submit something to me. I made it very plain what I was doing. They have a tremendous buying power because they are a very very large furniture buyer and I believe Mr. Moorehead can give you an idea——

Q. (Interrupting) All these concerns you have testified about, they were interested in making a sale, is that not correct?

A. Any one is interested in making a sale.

Q. And any one of the information or data they furnished to you was furnished to you without any charge, is that correct?

A. Why yes, yes, sure. I would like to answer that question a little bit different in regard to they were not compensated in any way at all from me, but I was doing business and trying to do business with firms that I knew would give us as low a price as any one and that is why I asked them to get out sketches and go ahead with it, because they have done the same for me many times before. I have bought quite a bit of equipment in my time and I have furnished quite a number of places.

Q. It is true they would do that for any prospect?

A. No.

Q. Say any reputable prospect?

A. They would have to know the party, know they were reliable. They wouldn't go in and put in

(Testimony of P. G. Denson.)

all those man hours unless they [308] felt they had better than a 50-50 chance of getting that business.

Q. That is just part of their business?

A. That is part of their business, yes. I think any of those firms would testify.

Q. Mr. Denson, going back to the discussion with reference to the contract, I believe you testified that at no time was anything said in Mr. Cooke's office, or anywhere else, about this agreement of September 24, 1945, being a preliminary agreement. Was that your testimony?

A. Well, I wouldn't say preliminary at all. It was really a contract that was binding and tied me in and it specifically states there if I don't perform that contract that I forfeit, Mrs. Mapes has the right to keep the ten thousand dollars I put up or the twenty thousand, and I was ready and willing to put up the twenty thousand instead of ten thousand.

Q. I want to call your attention to a copy of this contract and ask you to examine that, the original of the contract, and ask you if that isn't your signature?

A. Yes, this is my signature. This is the clause that we all initialed up here and inserted down there.

Q. I refer your attention to Paragraph 10, where it says: "The said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely [309] set forth all the usual or necessary conditions, to the end

(Testimony of P. G. Denson.)

that the rights and interests of each party shall be properly conserved and protected." That clause was in this when you signed it?

A. That was in there. What it means though, the regular form of lease here, subject in the State of Nevada and county and city of Reno here, to all their laws set up by them to be inserted in our lease. That is all embodied in their lease and that would be the kind of a lease that I feel that they would draw for me.

Q. Mr. Denson, in view of this Clause 10 I have just referred to and which you read and which refers to this fact of this being a preliminary agreement, I will ask you to state as a fact whether or not this was considered as a preliminary agreement?

Mr. Sinai: We object, your Honor, on the ground the instrument is the best evidence of what it says.

The Court: The objection is good. It will be sustained.

Mr. Cooke: We would like the record to show our exception to that ruling, your Honor, on the ground that Mr. Denson stated a moment ago that this was not a preliminary agreement and we have the right on cross-examination to ascertain why, in view of the expressed provision of the contract, he makes that statement. It is strictly cross-examination.

Mr. Sinai: We submit, if the Court please, [310] to peruse examination of this type would be merely argumentative.

(Testimony of P. G. Denson.)

The Court: He just stated his grounds of exception. The ruling stands. He may have an exception on the grounds stated.

Q. Mr. Denson, you testified that you conferred with some concern by the name of McMahon?

A. McMahon Furniture Company.

Q. Where are they located?

A. I can't give you all, I can give you some—Fresno, California, Visalia, I am pretty sure Bakersfield, and out of Santa Monica. They are a very, very large concern.

Q. Did you obtain any plans from them?

A. I did not, no. The fact I knew Mr. McMahon for quite a while and Mr McMahon had known for some time that I was——

Mr. Cooke: We object as not responsive, your Honor, we object to it.

The Court: The latter part may go out.

Q. I believe you also testified that you contacted a firm known as W. J. Sloane?

A. That is correct.

Q. Did you obtain any plans from them?

A. I did not. I left some plans with them.

Q. But they submitted no plans?

A. They did not, no.

Q. In addition you testified that you contacted representatives [311] of Mangrum, Holbrook & Elkus. Where is that firm located?

A. In San Francisco.

Q. Did you obtain any plans from them?

A. I did.

(Testimony of P. G. Denson.)

Q. Do you have those plans with you?

A. I have the first plan that he furnished to me and also have a copy of the plan that he furnished to Charles.

Q. But you didn't bring them with you?

A. They are here.

Mr. Platt: Do you want to see them?

Mr. Sinai: Do you want them?

Q. Mr. Denson, I believe you stated that Mangrum, Holbrook & Elkus furnished some plans to Charles Mapes?

A. Well, I will say this. I won't say that he furnished them to him. It was my understanding that he sent them to him, anyway I was given a copy of the plan that he had gotten out for Charles and he told me of Charles' interview with him and also given me, I think, some of the specifications.

Q. Who was it that gave you the specifications?

A. Mr. Brown. He is the draftsman. I am not sure whether he contacted Mr. Moorehead's office or not. He told me of Charles' visit.

Q. Well, Charles Mapes Jr. was the one that ordered those plans from Mangrum, Holbrook & Elkus, rather than you, is that [312] true?

A. No, I was the one.

Q. Why did he send the plans to Charles?

A. Well, Charles told him I was out of the picture, that he would settle up with him and the next time I called on Mr. Brown that was the information I got from him.

(Testimony of P. G. Denson.)

Q. Did Mr. Brown tell you that Charles told him that?

A. Did Mr. Brown tell me that?

Q. Yes.

A. Yes, he did.

Q. When did this conversation take place?

A. Well now I would say I know this, I know it was after—either the latter part of—during the latter part of April or May. The plan would show the dates of those things.

Q. It was after April 1st?

A. Oh yes, it was after April 1st that Mr. Brown told me of the conversation with Charles, when Charles called on him.

Q. Did he tell you when Charles called on him?

A. Well, he might but I can't say just when it was. Probably the data and everything will show the dates, if you care to see them.

Q. You don't know whether it was before or after April 1st?

A. In regard to Charles?

Q. Yes.

A. I give you my word of honor it was after April 1st, even [313] after April 5th.

Mr. Platt: 1946?

A. Of 1946, of this year.

Q. Mr. Denson, were you in Mr. Cooke's office about April 10, 1946?

A. I was in his office on April 10, 1946 through three o'clock, absolutely.

(Testimony of P. G. Denson.)

Q. I believe you testified that Mr. Cooke was present?

A. Oh yes.

Q. And Charles Mapes was present.

A. We went there by appointment Charles had made.

Q. Isn't it true that on that occasion, in the presence of Charles Mapes, that you were told the ten thousand dollar deposit that you put up would be refunded to you?

A. I think my testimony will explain word for word what took place in regard to what led to——

Mr. Platt: Well, answer the question.

A. Yes, he told me the easy way to settle it would be to give me back my ten thousand dollars and I informed him I did not come over there to take down my deposit on my contract.

Q. He did offer to give it back?

A. He didn't offer. He said the easy way to settle this thing would be to give me back my ten thousand dollars and I informed him my ten thousand dollars was a deposit on my contract and I didn't come over to take my ten thousand dollar deposit [314] down.

Q. Mr. Denson, isn't it a fact that from January 1, 1946 up to April 1, 1946, Mrs. Mapes, in numerous telephone conversations with you, requested you to come to Reno and settle up your affairs with Charles, make definite arrangements with him as to your association?

A. At no time.

(Testimony of P. G. Denson.)

Q. At no time at all?

A. At no time, no. There was never anything like that said between Mrs. Mapes and I because they were all familiar with what I was doing..

Mr. Cooke: I move to strike out the latter part there as not responsive to the question.

The Court: The latter part may go out.

Q. Well, during that same period, Mr. Denson, didn't Mrs. Mapes call you on the phone on numerous occasions and ask you to come to Reno for the purpose of settling up the matters pertaining to this proposed lease?

A. I answered that. At no time did Mrs. Mapes ever phone me and ask me to come there in regard to the lease. It was discussed whether I should be in Reno or not and I was willing at all times, after I closed out my hotel. Mr. Moorehead informed them it would be more valuable to him for me to be around his office where he could confer with me. Mr. Moorehead told them that.

Mr. Cooke: I move that be stricken.

The Court: It is not responsive, it may go out.

Q. Mr. Denson, what I had in mind was this: the first question I asked you was with reference to any telephone conversation between you and Mrs. Mapes.

A. I answered that.

Q. Concerning your agreement with Charles.

A. I understood your question and I answered it.

Q. Your answer is the same to both questions?

(Testimony of P. G. Denson.)

A. Yes, excepting as I told you of my conversation with Mrs. Mapes on March 25th of 1946. I phoned Mrs. Mapes. Mrs. Mapes did not phone me, and I talked to Mrs. Mapes on the phone and she said she was sorry that Charles was not here, there was a little something he wanted to mention about the sky room.

Q. Yes, I recall.

A. I did receive a phone call from Charles before the contract was signed, to meet with him, to come over to get at a contract.

Q. Mr. Denson, can you state how many telephone calls you have received from Mrs. Mapes concerning your negotiations in connection with this hotel during the time you have been dealing with her?

Mr. Platt: Do you mean before the signing of the contract or afterward?

Q. Any time. Just a moment—let me correct that—after the [316] date of September 24, 1945, when the agreement was signed, can you state how many times Mrs. Mapes called you with reference to matters pertaining to the hotel?

A. I don't recall, in fact, I am practically positive that Mrs. Mapes has never called me herself on the phone from Reno or any other place after the 4th of October that I was over here. Any phoning that was done, I did it myself.

Q. Did Charles ever call you on the phone?

A. Yes, Charles phoned me afterward.

(Testimony of P. G. Denson.)

Q. Have you any idea how many times he called you?

A. Well now I do know of one time that he phoned me. He might have probably phoned at Visalia to find out where I was and he got me in Los Angeles, due to the fact that I was down there closing my deal, and he phoned me in Los Angeles and wanted me in Mr. Moorehead's office to go over the plans. Now this was after the contract was signed, of last year. That was in December and I think the record will show that I met Charles on the 28th of December in Mr. Moorehead's office and spent the day with him, which they deny. I am almost positive that is the date. I have the record with me of the hotel where he registered and the date he registered.

Q. That is your recollection, December 28th?

A. I think that was December 28th. I am almost positive.

Q. And the telephone conversation was several days prior?

A. No, it was either the day before or the day before that, [317] either the 26th or 27th, because I drove back to Visalia, stayed all night, and left the next morning in order to keep my appointment there and was there on time in Mr. Moorehead's office.

Q. Do you recall whether on November 26, 1945, you had a talk with either Charles or Mrs. Mapes on the phone?

(Testimony of P. G. Denson.)

A. It could have been the 26th I talked to Charles.

Q. This is the 26th of November?

A. Oh no, this was December I am speaking of, December, either the 28th——

Mr. Platt: (Interrupting) Counsel is asking a question.

A. Pardon me.

Q. I asked you, Mr. Denson, if you had a telephone conversation with Mrs. Mapes or Charles, either one called you on the telephone on November 25, 1945?

A. Well, he might have.

Q. Do you recall?

A. I can't remember the conversation or whether they called me or whether I called them.

Q. Do you remember any telephone conversation had between you and either Mrs. Mapes or Charles on December 12, 1945?

A. I might have talked to them on the phone. I know I called them quite often.

Q. I mean did they call you? [318]

A. The only time I can remember is when Charles phoned me in December, but he could have phoned me before, but I just don't recall it.

Q. Well, did Charles or Mrs. Mapes either call you on March 29, 1946?

A. March 29th?

Q. March 29, 1946?

A. March 29, 1946?

Q. Yes sir.

(Testimony of P. G. Denson.)

A. Charles called me—now let me get the way it was—I called them on the 25th and 26th and the 27th. Now it might have been the 29th and that was probably Friday, because he was to call me the next day, Wednesday, but he didn't, he waited. It was probably either Friday or Thursday, as I said before. I received a call from him wanting to meet me. That is when he told me on the 26th he would phone me to specify the time and date to meet him in Mr. Moorehead's office.

Q. Then there were other instances, other than this December 27th or 28th, 1945, when either Charles or Mrs. Mapes called you on the telephone?

A. That is the only time I remember Charles calling me, was after I talked to Mrs. Mapes, when he called me on the 29th of March, 28th or 29th of March, I guess it was, because I came up on Sunday, was the 31st of March, and I came to San Francisco on the 31st by plane in order to be here to meet him the [319] next morning.

Q. Did I understand you to say that you talked with Mrs. Mapes?

A. On March 25th for 8 minutes and the records show it.

Q. That was on the telephone?

A. On the telephone, yes. I have those records with me.

Q. That was on your call to her?

A. My call to Mrs. Mapes and then I called Charles the next day, on the 26th. I have the

(Testimony of P. G. Denson.)

records to show that. But Charles did phone me on either the 28th or 29th, I am positive of that.

Q. Where were you, Mr. Denson, at the time you got that call on the 21st of March?

A. I was at the Figueroa Hotel. Either he caught me at the Figueroa Hotel or the California State Hotel Association State Hotel Association at 607——

Q. In what city was it?

A. Los Angeles. It is their office, 607 So. Hill Street,

Mr. Furrh: That is all, your Honor.

The Court: Any further examination?

Re-direct Examination

By Mr. Platt:

Q. You testified, Mr. Denson, that you secured plans from Mangrum, Holbrook & Elkus, that you conferred with a Mr. Brown of that firm?

A. Yes, [320]

Q. Have you those plans with you?

A. We have them here, yes.

Q. Will you submit them?

A. Here is one. This is March 8, 1946 by Mangrum, Holbrook & Elkus and this particular lay-out there and here is one of June 6th. This is the one that he made up for Charles and it was supposed to be the same lay-out of the details. This is August 13th to Mr. Charles Mapes, this plan here. This date is 6-13-46. This is the copy that he gave me when he told me that Charles had been in. This is

(Testimony of P. G. Denson.)

the one he brought down to the Sir Francis Drake and one he offered me and I told him he would have to make it out to a larger scale and more detail. I wouldn't be able to explain it as it was.

Q. These were plans furnished you?

A. Yes, these he kept sending me. These others—they have Charles' name on it, those three plans there and this is also in regard to specifications and details.

Q. These plans are with respect to the furnishing and equipment of the hotel?

A. Of the culinary department.

Q. Of the culinary department?

A. That's right.

Mr. Platt: We offer them in evidence.

Mr. Furrh: If your Honor please, we would like to ask the witness a few questions.

The Court: You may do so.

Recross-examination

By Mr. Furrh:

Q. Mr. Denson, you previously testified that the various plans which you obtained from these concerns were furnished to you without any charge on the part of the particular company involved and that same thing applies to these plans, does it not?

A. Same thing applies to these plans.

Q. Mr. Denson, do you know whether any of these plans that I have in my hand were adopted for use of the hotel that is being constructed?

(Testimony of P. G. Denson.)

A. I couldn't tell you. In my opinion not. I understand they have given the contract to the Dohrmann people.

Q. And so far as you know the building hasn't been constructed to conform with any of these plans?

A. At the time we were getting these plans, we would liked to have had plans so the plumbing could have been arranged for, but Mr. Moorehead decided to drill the concrete floor for connections and roughing in of the plumbing.

Mr. Cooke: The defendants object to the admission in evidence of the documents identified by the witness and questioned about by counsel, on the ground that it affirmatively appears that they do not constitute any part performance or portion of part performance; that there is no contract pleaded, oral contract pleaded on which there could be any part [322] performance, that the papers in question in any event simply constitute an expense to whoever furnished them, to be remedied by payment of dollars and cents and therefore could not, under the rules of equity, constitute part performance; that the party furnishing them, if he had any claim at all, would have his action for recovery of the amount that he paid for them, and in this case it does not appear that Mr. Denson paid anything whatever for them and hence they are incompetent and irrelevant and simply encumbering the record. We would like to add our general objection also

heretofore stated to Exhibits E and F, that the complaint does not state a cause of action for performance on a written contract and does not state a cause of action for part performance on an oral contract, there being no oral contract alleged.

The Court: Objection overruled. This will be Exhibit K admitted in evidence.

Mr. Platt: We have no further questions.

The Court: Any further questions of this gentleman, Mr. Cooke?

Mr. Cooke: No your Honor, not now.

The Court: This witness may be excused then.

Mr. Platt: We reserve the right to recall him if we desire.

The Court: Yes, you may recall him if you so desire.

Mr. Cooke: If the Court please, Miss Gloria Mapes is here under subpoena by the plaintiff and I would like to inquire if she will be called today; if not I would like to have her excused. She has some engagements of her own to attend to.

Mr. Platt: We have no objection, if she would be on call.

The Court: Is there a possibility she might be called?

Mr. Platt: I think it is remote.

The Court: Will she be somewhere where she will be available?

Mr. Cooke: Yes, we can get her on call.

The Court: She may be excused then.

T. P. MOOREHEAD

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. Will you state your full name?

A. Theodore Parker Moorehead.

Q. What is your residence address?

A. 374 - 63rd Street, Oakland.

Q. What is your business address?

A. 433 - 14th Street, Oakland.

Q. What is your business or profession or vocation? A. Civil engineer by profession. [324]

Q. You have been so engaged for many years past? A. Since 1905.

Q. In connection with your business have you ever prepared plans and designs, specifications, for hotel buildings? A. Many of them.

Q. Are you acquainted with the plaintiff in the action, Peter G. Denson? A. I am.

Q. Do you remember when you first met him?

A. About 1929.

Q. And where, if you recall?

A. In San Francisco.

Q. Do you remember under what circumstances you met?

A. He was interested in operating a hotel which I was developing in Salem, Oregon.

Q. Did you have business connections with him on that occasion?

(Testimony of T. P. Moorehead.)

A. The deal never went through.

Q. But you did have business relations?

A. Just in connection with his operating the hotel.

Q. You have met and known him many times since?

A. I didn't meet Mr. Denson again until 1944.

Q. What was the occasion of your having met him at that time?

A. I heard that there was a lady in Reno building a hotel and Mr. Denson knew who she was. [325]

Q. Do you recall about when it was in 1944 that you interviewed him about what you have said?

A. May or June, I would say, May or June, 1944.

Q. Are you acquainted with the defendant, Mrs. Mapes, Irene Gladys Mapes? A. I am.

Q. And Charles W. Mapes, Jr.? A. I am.

Q. And Gloria Mapes? A. I am.

Q. And under what circumstances did you become acquainted with all three of the defendants?

A. I first met Mrs. Mapes—I wrote Mrs. Mapes that I heard she was going to build a hotel in Reno and I would like to get in touch with her. I had no reply to that letter. Then I telephoned Mrs. Mapes and told her I would like to discuss the matter with her and she said she would be glad to see me if I came to Reno, so I came to Reno and met Mrs. Mapes at her residence in Reno some time in July, I would think it was, of 1944.

Q. You had never heard of Mrs. Mapes or any of

(Testimony of T. P. Moorehead.)

the other defendants until your conversation with Mr. Denson about which you have testified?

A. No.

Q. Are you acquainted with the property in Reno, Nevada, generally [326] known as the Mapes Hotel site? A. I am.

Q. Under what circumstances did you become acquainted with that?

A. I am building the hotel for Mrs. Mapes.

Q. When did you first confer with Mrs. Mapes with respect to the building of the hotel?

A. At the first interview.

Q. At the first interview?

A. The first interview.

Q. Who, if any one, was with you upon that first interview? A. No one that I recall.

Q. You went by yourself?

A. Came up by myself.

Q. Was Mr. Denson's name mentioned in that conversation? A. I think it was.

Q. By whom? A. By myself.

Q. Do you remember what you told Mrs. Mapes?

A. I told Mrs. Mapes that Mr. Denson——

Mr. Cooke (Interrupting): The question is if you remember what you told her.

A. Do I know what I told Mrs. Mapes?

Q. Yes.

A. I don't remember the exact words, no. [327]

Q. No, I wouldn't expect you to, but do you remember in substance what you told her about Mr. Denson? A. I told her that——

(Testimony of T. P. Moorehead.)

Mr. Cooke (Interrupting): He is not asking what you told.

The Court: Answer yes or no first and see what develops.

A. I don't know what I told Mrs. Mapes, not in words.

Q. I understand, Mr. Moorehead. You say that Mr. Denson's name was mentioned in this first conversation? A. I think it was.

Q. Do you know whether it was you or Mrs. Mapes that first mentioned Mr. Denson's name?

A. I couldn't tell you.

Q. Do you recall whether you mentioned Mr. Denson's name?

A. During the course of the convention I probably did.

Q. Do you recall what you said to Mrs. Mapes about Mr. Denson, just answer yes or no.

A. Do I recall? Yes, I think I do.

Q. Well, what did you say?

Mr. Cooke: We object to it as incompetent, irrelevant and immaterial. It occurred two years before there were any contractual relations with the plaintiff, that it couldn't be anything but preliminary negotiations or circumstances. It isn't shown that Mr. Denson was a party to the transactions [328] and what was said there between Mrs. Mapes and Mr. Moorehead, if it had any bearing at all, would be conclusively presumed to be merged in the written contract of September 24, 1945. That this talk, fragmentary conversation, had immediate prior to that are all inadmissible, cannot constitute legal

(Testimony of T. P. Moorehead.)

evidence for any purpose whatsoever. We object on the further ground that the written document must speak for itself. If it is evidence for any reason, it cannot be sufficient by relation of conversations between various parties with Mrs. Mapes or any of the defendants prior. If it is evidence as a matter of law, the law speaks for itself; if it is evidence as a matter of fact, you can supply it by testimony of preliminary negotiations or preliminary talks, but this does not refer even to the conducting of preliminary negotiations because it is not between Mr. Denson and Mrs. Mapes at all; just a mere social talk between Mr. Moorehead, who at that time had no connection with the subject matter, wasn't authorized to speak for anybody except himself, and was a talk with Mrs. Mapes about what she hoped to do about the hotel building and the like.

The Court: I have some doubt as to the admissibility of this conversation or statement. But the question asked for a statement, not a conversation.

Mr. Platt: That is all. [329]

The Court: I will sustain the objection. My reason for sustaining it is that the question calls for statement by this witness as to Mr. Denson. He is not an agent who has any responsibility for any information concerning Mr. Denson or responsible for any question concerning Mrs. Mapes.

Mr. Platt: If your Honor please, your Honor will recall that about all the allegations of this complaint are denied except the signing of the contract and we are attempting to show not only the efforts of Mr. Denson in complying with the terms,

(Testimony of T. P. Moorehead.)

conditions and covenants of the contract, but we also desire to show that he furnished the contractor or the builder who is now building the hotel. Mrs. Mapes, from that time on, has constantly called upon her builder and the cooperation of Mr. Denson, and we desire to show that she had never heard probably of Mr. Moorehead until Mr. Denson had come into the picture.

The Court: I wouldn't consider admitting such testimony covered by this offer, but I don't think this question has any relation whatever to the offer you just stated. The ruling will stand.

Q. Well, upon this first visit, Mr. Moorehead, about which you testified, what did you discuss generally with Mrs. Mapes?

Mr. Cooke: Objected to as incompetent, irrelevant, [330] and immaterial.

The Court: If this question is for the purpose of bringing out a conversation that took place at that time, the objection will be overruled.

Mr. Platt: Well, that is the purpose of it, your Honor.

The Court: The first question really asked for a statement of this witness. That is why I sustained the objection.

Mr. Cooke: We wish to state our objections at this time.

The Court: You may do so. The ruling will be withdrawn until you make your objection.

Mr. Cooke: We object on the ground that anything that was said between Mr. Moorehead and

(Testimony of T. P. Moorehead.)

Mrs. Mapes at that time is incompetent, irrelevant, and immaterial as to any evidence that there was any binding contract that was subject to specific performance, either under part performance theory or under any other theory, made on or about September 24, 1945, over a year later. That it is at most merely a talk between Mrs. Mapes and Mr. Moorehead, with a view of constructing the building, I take it, which would have nothing to do with the relation which Mr. Denson might have. It is not offered for any such purpose apparently. With regard to the allegations in the complaint or amended complaint, where it is alleged [331] that Mr. Denson furnished the contractor and architect on the job, referring to Mr. Moorehead, that is objected to so far as being any proof of that matter is concerned, because that is not any part performance. We have heard considerable about that, your Honor, about bringing Mr. Moorehead into the picture. I wonder what would happen if Mr. Moorehead turned out to be a negligent, unsuccessful, and ignorant contractor and caused us millions of dollars of damages over there. We couldn't hold Mr. Denson for that, and why Mr. Denson should hold us on the theory he furnished us something of value because he casually or otherwise mentioned the name of Mr. Moorehead as a man who might do this job for us, is beyond me. It is making a mountain out of a mole hill, and it seems to me the whole thing of Mr. Moorehead being brought in here, as having anything to do with contractual relations of Mr. Den-

(Testimony of T. P. Moorehead.)

son and Mrs. Mapes is absolutely without any foundation and we more particularly object, and insist upon it, that under no principle of law that ever I heard of, can parties bring in conversations had a year or more before, or any time before the contract.

The Court: That point, it seems to me, to have been waived by your own cross-examination of Mr. Denson. You opened up by inquiring into matters that took place in 1940 which have been excluded by ruling of the court on direct examination. [332]

Mr. Cooke: All right, questioned on that and then went back to 1944 and they opened that up.

The Court: No, you opened it up on cross-examination.

Mr. Cooke: 1944?

The Court: You went back to 1940. So is that the full statement of your objection?

Mr. Cooke: Yes, sir.

The Court: Objection will be overruled. The witness may answer the question. Will the reporter please read the question to the witness?

(Question read.)

Mr. Platt: I will withdraw this question and put it in this other form, your Honor.

Q. What conversation, if any, did you have with Mrs. Mapes upon that occasion?

Mr. Cooke: Same objection, your Honor, to the question as amended.

The Court: That will be the same ruling.

A. The conversation was in connection with fur-

(Testimony of T. P. Moorehead.)
nishing our services for designing and constructing the hotel.

Q. And during that conversation was the name of the plaintiff, Mr. P. G. Denson, mentioned?

A. I have already said it was.

Q. And do you remember who first mentioned it?

A. No. [333]

Q. How long were you in the presence of Mrs. Mapes upon that first occasion?

A. Oh, perhaps two hours.

Q. Was there any one else present except you and Mrs. Mapes?

A. During the conversation only Mrs. Mapes, so far as I can remember, I may have met Gloria and some other people. I don't recall whether they were there at that particular time.

Q. And did you see Mrs. Mapes after that first interview? A. Yes.

Q. And when and where was that?

A. On two or three occasions here in Reno.

Q. Do you recall about what the dates were?

A. I can't recall the dates. It was some time between July and well up to the present time, as far as that goes, I have had interviews with Mrs. Mapes.

Q. In any of these interviews or conversations that you had with Mrs. Mapes was anybody else present?

A. Oh, when we came Mr. Cooke was present. I don't recall whether Charles was present at any of those times or not.

(Testimony of T. P. Moorehead.)

Q. You are referring now to interviews with Mrs. Mapes here in Reno? A. That's right.

Q. Was Mr. Denson, the plaintiff, present at any of these conversations?

A. I do not think so. [334]

Q. In any of these conversations that you had with Mrs. Mapes was the question of who was to lease or manage the hotel discussed with her?

A. Not in detail. It may have been brought up, not in detail.

Q. Well, was it mentioned at all?

A. Yes, I think it was.

Q. When was that mentioned?

A. Oh, on some subsequent conversation.

Q. Can't you give us an approximate date?

A. Oh, it may have been in August.

Q. Of 19——? A. '44.

Q. And do you remember where that was mentioned?

A. I only saw Mrs. Mapes in Reno during 1944, yes.

Q. Well, the mention of the management or lessee of the hotel was made during one of these 1944 interviews? A. Yes.

Q. What was the conversation between you and Mrs. Mapes with respect to the management or lessee or lessees of the hotel on that occasion?

Mr. Cooke: Defendants object on the ground it is incompetent and immaterial; that it isn't claimed here that Mr. Denson is the manager or ever was

(Testimony of T. P. Moorehead.)

agreed upon as the sole manager and operator of this hotel under any condition; that the evidence is inconsistent with the case sought to be made [335] by the complaint; that it is not any evidence upon which specific performance can be based in any event; that whatever was said upon the subject by Mrs. Mapes and Mr. Moorehead would be determined by the written contract that was subsequently agreed upon, which contains no reference to his being the manager of the hotel at all; that this is going outside of any contract or any writing or any undertaking by either of the parties; that there is no claim made that Mr. Denson had any agreement with anybody that he was to be the manager of this hotel; therefore, if your Honor please, it seems to me that this is objectionable and inadmissible, together with the reasons advanced in other objections that I have heretofore made. We certainly can't be charged with having opened up this feature. Your Honor overruled an objection that I made as to a conversation in regard to Mrs. Mapes and Moorehead on direct examination, so I don't understand how it could be admitted upon any theory that we waived any rights, because we have consistently and insistently rather made ourselves a nuisance by making objections about all these preliminary talks and arrangements either between Mr. Denson and Mrs. Mapes or Mrs. Mapes and anybody regarding this matter prior to September 24, 1945. Where parties have entered upon a written document, this is conclusively presumed to embrace all other pre-

(Testimony of T. P. Moorehead.)

vious negotiations and understanding with reference to the subject matter, so we do not feel that we have [336] waived any rights in that regard, but we have maintained that stand before your Honor from the start.

The Court: Objection overruled. You may answer the question.

(Question read.)

A. We discussed the leasing or operating of the hotel and she told me that there were several people who were interested in operating the hotel. I can give you some names that she was negotiating with, various people—she wasn't negotiating, but had approached her in regard to operating the hotel and also in regard to purchasing the property or leasing the property.

Q. Do you recall whether Mr. Denson's name was mentioned? A. It was.

Mr. Cooke: Same objection.

The Court: The answer may be withdrawn and the objection made and there will be the same ruling. Now answer the question. What is the answer to that question?

A. Yes.

Q. Do you remember who mentioned the name of P. G. Denson?

Mr. Cooke: May this same objection go to all questions in regard to conversation at that time without repeating, your Honor?

(Testimony of T. P. Moorehead.)

The Court: It may be so considered. Same ruling. [337]

(Question read.)

A. We both mentioned the name.

Q. Well, do you recall what was said by either one of you or both with respect to Mr. P. G. Denson?

A. That Mr. Denson was interested in taking the lease on the hotel.

Q. Who said that?

A. I perhaps said it and Mrs. Mapes may have said it. I know that Mr. Denson had told me he was interested in taking a lease on the hotel.

Mr. Cooke: I move to strike the latter part on the ground it is hearsay.

Q. Well, it is what you told Mrs. Mapes, isn't it?

A. Yes.

Mr. Cooke: You told her that Mr. Denson had told you he was interested?

A. That is right.

Mr. Cooke: I see. I withdraw my objection.

Q. Did Mrs. Mapes inquire of you as to Mr. Denson's responsibility and ability?

A. No.

Q. Was that discussed between you?

A. It was discussed but I wasn't in any position to say just whether Mr. Denson was responsible or not at that time.

Q. Well, you say it was discussed? [338]

A. Yes.

Q. Can you state about what was said by either

(Testimony of T. P. Moorehead.)

of you, or Mrs. Mapes, or both of you, concerning Mr. Denson?

A. I told her that I knew Mr. Denson.

Q. What did you say?

A. What did I say?

Q. Yes.

A. I can't tell you that.

Q. Can't you remember about what you said?

A. I can say that I worked with Mr. Denson on this project in Salem in 1929 and that we were working on a deal for a hotel at that time. As to anything regarding Mr. Denson's responsibility, I don't think I made any statement regarding his responsibility in regard to the hotel.

Q. Well, was your statement with respect to your working with Mr. Denson on the other hotel project that you have talked about in response to an inquiry that was made by Mrs. Mapes to you?

A. I couldn't tell you that. We discussed Mr. Denson. Whether Mrs. Mapes asked me or I brought up Mr. Denson's name, I couldn't tell you. I know we discussed Mr. Denson but I did not tell Mrs. Mapes whether I thought Mr. Denson was financially responsible to operate a hotel because I didn't deal—it was a matter entirely between Mrs. Mapes and Mr. Denson, not between me and Mrs. Mapes. I was only there for the purpose [339] of selling my own services.

Q. Did you tell Mrs. Mapes that Mr. Denson had told you to interview her?

(Testimony of T. P. Moorehead.)

A. I told—yes, I told Mrs. Mapes that.

Q. These conversations about which you are testifying occurred, as I understand, in the year 1944?

A. They extended clear into 1945 until I obtained this contract, my own contract, from Mrs. Mapes and Charles W. Mapes.

Q. Did you ever have any conversations with Mrs. Mapes or any of the other defendants, Charles or Gloria, in any other place except the City of Reno?

A. Yes.

Q. When and where did they occur?

A. In San Francisco on two occasions. One at the Sir Francis Drake Hotel in San Francisco on V-J Day and another at the Fielding Hotel. I don't recall that date.

Q. Do you recall who was present at the conversation at the Sir Francis Drake Hotel?

A. Mrs. Mapes, Mr. Denson, Mr. Slocum. I don't recall whether Charles was there at that time or not.

Q. Who was Mr. Slocum?

A. Mr. Slocum is an architect that I engaged to be associated with us in the design of this building.

Q. How did it happen that you met with Mr. Denson and Mrs. Mapes and the people you mentioned, Mr. Slocum and others, in [340] San Francisco at the Sir Francis Drake Hotel on this occasion?

A. It was for the purpose of discussing——

Q. Pardon? A. How did it happen?

(Testimony of T. P. Moorehead.)

Q. How was it arranged that you were to meet at that time?

A. It was prearranged in order——

Q. (Interrupting): Who arranged it?

A. Mr. Denson and myself.

Q. Do I understand by that that Mr. Denson informed you that such a meeting would take place?

A. No. May I withdraw. I sought the interview. I wanted to get the sketches which we prepared gone over and discussed so that we could know just what we could do in getting out the sketches.

Q. How did you seek the interview? Did you talk to Mr. Denson first about it or Mrs. Mapes or Charles Mapes or someone else?

A. I think I talked to Mr. Denson first and asked if he could be here and then either I or Mrs. Denson got in touch with Mrs. Mapes and asked if she could be in San Francisco. I don't recall whether it was myself or Mr. Denson phoned Mrs. Mapes.

Q. Do you remember whether you phoned Mrs. Mapes?

A. I just said I don't remember whether I phoned or Mr. Denson.

Q. But at any rate she was there for the interview? [341]

A. Yes.

Q. And what was the date of that interview?

A. That was V-J Day. That date I do not recall. Mr. Denson said either August 14th or 15th, whatever day V-J day was; I remember that.

Q. What year?

A. 1945.

(Testimony of T. P. Moorehead.)

Q. At any rate, it was the day the Japanese surrendered?

A. That's right. I recall that.

Q. Where did that meeting take place?

A. On the mezzanine floor of the Sir Francis Drake Hotel in San Francisco.

Q. What was done and said at that meeting?

Mr. Cooke: Just a moment. Another meeting and another occasion, August 14, 1945, and I am forced again to insist upon my objection on behalf of the defendants that this is incompetent and immaterial and irrelevant, being a part of the alleged preliminary negotiations occurring prior to the date of the signing of the Exhibit C, the agreement, over a month later, and that whatever was said or done at this meeting bearing upon the question of the contract, or proposed contract, would be conclusively deemed to be merged in the contract and hence inadmissible for any purpose whatever, there being no allegation of mistake or fraud mixed up in the case. I do not know just how I can state that objection any [342] stronger, your Honor. You consistently overruled the objection from the start, but any way that represents our position, that there is no exception to that rule that would permit of this type of evidence, so far as we know. There is no reason why this case should be an exception to the thousands of cases involving similar situations, where it is sought to bring out what was said, etc., prior to the making of a written agreement and it

(Testimony of T. P. Moorehead.)

has been invariably excluded, and we think that that rule is applicable here, your Honor.

The Court: The objection will be overruled. The witness may answer the question.

(Question read.)

A. Examination of preliminary sketches were made.

Q. Who submitted the sketches? A. I did.

Q. And of what were they?

A. Plans of the hotel.

Q. Of the hotel proper?

A. Floor plans of the various floors of the hotel.

Q. Were any suggestions made by anybody as to modification and change of those plans?

Mr. Cooke: May our objection apply to all similar testimony that occurred at this time, your Honor?

The Court: It may. Same ruling.

A. Yes, there were suggestions made. [343]

Q. Do you recall who made them?

A. Probably Mrs. Mapes.

Q. Did Mr. Denson make any? A. Some.

Q. What suggestions do you recall that suggestions were made by Mr. Denson, the plaintiff, at that time? A. About the check rooms.

Q. What else?

A. The number of rooms that we should have in the hotel as a whole.

Q. What change did he recommend as to that?

(Testimony of T. P. Moorehead.)

A. He recommended a minimum number of rooms, not to have too many rooms.

Q. What other change did he recommend?

A. I can't recall any other, no particular changes. There were undoubtedly other changes but I can't recall just what particular changes were recommended. Both Mrs. Mapes and Mr. Denson made suggestions as to what the size of the rooms should be and the number of showers, number of baths, and so on and so many details developed I don't remember. Those, you understand, were only preliminary plans. They were not the working drawings, not the plans as adopted.

Q. Were those preliminary suggestions made by Mrs. Mapes and Mr. Denson adopted and made a part of the preliminary plans?

A. Some were and some weren't. We objected to some and [344] showed where some of the objections were not sound. Other suggestions were sound and some we put in which we did not recommend ourselves. The owners wanted it and Mrs. Mapes wanted it so we put in what Mrs. Mapes wanted.

Q. And do you recall when next you met with Mrs. Mapes or Charles or both of them, and Mr. Denson in San Francisco?

A. I saw Charles on one or two occasions in Oakland because he was in the service in Oakland and we met again with Mrs. Mapes in San Francisco at the Fielding Hotel on a subsequent date.

Q. Who were present at that meeting?

(Testimony of T. P. Moorehead.)

A. Mrs. Mapes and Charles, Mr. Denson, Mr. Slocum and myself.

Q. And where in the Fielding Hotel did you meet?

A. On the mezzanine floor, the second floor, the lounge space.

Q. What was said and done at that meeting?

A. We again discussed——

Mr. Cooke: Will you fix the date of that, Mr. Platt?

Q. Yes; can you give us the date of that meeting at the Fielding Hotel?

A. It must have been in early September.

Q. In 1945? A. In 1945.

Mr. Cooke: I object on the ground that it affirmatively appears by the statement “early September” that the conversation asked for was prior to the execution and delivery [345] of the document, Exhibit C, which purports to be the only written agreement of any kind in the case and which embraced all of the terms that the parties saw fit to put into it at that time and anything said or done prior to that time between parties with reference to the subject matter appeared to be embraced in that document and therefore evidence on it is not admissible.

The Court: The objection will be overruled. Answer the question.

(Question read.)

A. We were there for the same purpose, discuss-

(Testimony of T. P. Moorehead.)

ing our sketches that had developed since our previous meeting.

Q. Did you submit plans and sketches at that time? A. Yes, and also elevation.

Q. And were any suggested changes made by any one present?

Mr. Cooke: Same objection, your Honor, may go to all this same testimony as to this meeting?

The Court: It may be so considered. Same ruling.

A. There were some suggestions, yes.

Q. Do you recall who made them?

A. Mrs. Mapes probably or Mr. Denson.

Q. And were the changes suggested by Mrs. Mapes and Mr. Denson adopted in the subsequent form?

A. Any changes requested by Mrs. Mapes were adopted.

Q. Were any changes suggested by Mr. Denson adopted? [346]

A. Only with Mrs. Mapes' approval.

Q. Well, were any suggested changes by Mr. Denson approved by Mrs. Mapes and later adopted?

A. That I couldn't say whether she approved. If any question came up, I asked Mrs. Mapes for her approval of it. Whether Mr. Denson's suggestions or Mrs. Mapes' suggestions, that I couldn't say. Any suggestion that was offered, any changes that were made, were changes made by Mrs. Mapes. Whether Mr. Denson suggested them in the first place or not, I cannot say.

(Testimony of T. P. Moorehead.)

Q. You don't remember whether Mr. Denson first suggested the changes or Mrs. Mapes?

A. I couldn't tell.

Q. But you do recall definitely that Mr. Denson made suggestions for changes? A. Yes, I do.

Q. And can you state now whether any of his suggestions were subsequently approved by Mrs. Mapes and incorporated in your plan?

A. I can't say definitely whether I do remember just what specific changes were made at that time.

Q. Was anything else discussed at that particular meeting at the Fielding Hotel except plans for the hotel structure proper? A. Not with me.

Q. Did Mrs. Mapes ever state to you, in substance, that she [347] contemplated that Mr. Denson and Charles Mapes were going to run and operate the hotel? A. I don't think she did.

Mr. Cooke: We object—this question calls for——

The Court: It is already answered, Mr. Cooke.

Mr. Cooke: I move to strike it so I can make my objection.

The Court: The motion will be denied.

Mr. Cooke: That question goes beyond the scope of the meeting at the Fielding Hotel. It is a general question as to he ever heard it.

The Court: If you would like to have the record show an objection and a ruling, it may be so deemed, so considered.

Mr. Cooke: Or an exception, either way.

(Testimony of T. P. Moorehead.)

The Court: All right, exception.

(Question and answer read.)

A. At that meeting at the Fielding Hotel, that is what you refer to?

Q. The question was intended to be more comprehensive than that.

A. She did. She told me prior to closing the agreement with Mr. Denson to lease the hotel that Mr. Denson and Charles were working on an agreement to operate the hotel. Is that the answer you wanted? [348]

Q. Well, I want you——

A. (Interrupting): I mean, that is an answer to your question?

Q. That is an answer to my question, and of course it was the answer I wanted.

A. Afterward she talked to me about it.

Mr. Platt: I think that is off the record.

Mr. Cooke: That was before signing of the agreement between Mr. Denson and Mrs. Mapes?

A. Yes.

Mr. Cooke: We make objection to the admissibility of that.

The Court: I will withdraw the ruling so you can object.

Mr. Cooke: I make the same objection.

The Court: Same ruling. Now you can answer the question.

(Question read.)

A. Yes.

(Testimony of T. P. Moorehead.)

Q. Do you recall about when she made that statement?

A. Some time during 1945 from our first meeting, oh, I would say some time between June and September, 1945.

Q. Did you ever have any conversation with Mrs. Mapes with respect to the capabilities of Mr. Denson as a hotel operator?

A. I have already answered that question.

Q. Well, if you did, Mr. Moorehead, I don't exactly recall it. [349]

A. I told you that I had conversation with Mrs. Mapes regarding Mr. Denson's operating a hotel that I offered no dictum as to Mr. Denson's responsibility for operating the hotel because that was entirely a matter for Mrs. Mapes to find out herself, not for me to give.

Q. Let me ask you this—did Mrs. Mapes ever at any time inquire of you as to Mr. Denson's qualifications as a hotel operator? A. Yes.

Q. When did she make that inquiry?

A. Probably during the latter part of 1944.

Q. And do you remember what she said when she so inquired? A. No, I don't.

Q. You don't?

A. I don't remember what she said when she so inquired, no.

Q. Do you remember what you said in reply?

A. Just what I told you in answer to the previous question; it was up to Mrs. Mapes to determine Mr. Denson's responsibility.

(Testimony of T. P. Moorehead.)

Q. Well, I want to get this straight in my own mind. I understood you to state, Mr. Moorehead, that Mrs. Mapes had inquired of you as to Mr. Denson's capabilities or qualifications as a hotel operator. Now am I correct in stating that you said that she had so inquired?

A. That is right, she did. [350]

Q. And you also stated that she inquired about that some time in the year 1944? A. Yes.

Q. Did she ever inquire after that time?

A. I don't think so. I think it was only discussed on one or two occasions.

Q. Well, when she asked you concerning the qualifications and capabilities of Mr. Denson as a hotel operator, what did you say?

A. I told her——

Mr. Cooke: Objected to as irrelevant and immaterial. The question of his abilities is not involved in the case. I also make the same general objection.

Mr. Platt: They are involved in the case.

The Court: Objection will be overruled. The witness may answer the question.

Mr. Cooke: I would like counsel to point out what part of qualifications——

The Court (interrupting): It is not necessary. The ruling has been made.

Q. Kindly answer the question.

(Question read.)

A. I told Mrs. Mapes what hotel I knew that

(Testimony of T. P. Moorehead.)

Mr. Denson had operated, which were the Hotel Tioga in Merced, the Hotel Medford in Medford, Hotel Johnson, which he was then operating [351] in Visalia. I knew nothing further of Mr. Denson's hotel operations.

Q. You have testified, Mr. Moorehead, concerning the two meetings in San Francisco, one at the Sir Francis Drake Hotel and the other at the Fielding Hotel. Was your architect, Mr. Slocum, present at both these meetings? A. Yes.

Q. Have you had any subsequent meetings in San Francisco since the two you mentioned?

A. With Mrs. Mapes?

Q. Yes.

A. Mrs. Mapes has been in Oakland once.

Q. And did you meet her at that time?

A. Yes.

Q. And do you recall about when that was?

A. Quite recently.

Q. Pardon? A. Since April, 1946.

Q. Since April, 1946? A. Yes.

Q. And was that interview by appointment?

A. No. Mrs. Mapes was coming to Oakland or to San Francisco for some specific purpose and came to my office.

Q. What was the general nature of the conversation upon that occasion? [352]

A. In connection with the construction of this building.

Q. Do you remember what was said?

(Testimony of T. P. Moorehead.)

Mr. Cooke: The question is whether you remember or not.

A. I do not.

Q. You don't recall anything about that conversation?

A. I know it was in connection with the construction and operation and plans.

Q. Did you have a conversation with Mr. Denson at Visalia at the Hotel Johnson? A. I did.

Q. On or about August 31, 1945, with respect to the plans of this hotel? A. August, 1945?

Q. Yes.

A. I don't recall August, 1945, in Visalia.

Q. Well, what is your best recollection?

A. I was in Visalia in December, 1945.

Q. I was advised that date was August 31st but I may have the wrong information.

A. I was in Visalia on two occasions at Mr. Denson's hotel and discussed it with Mr. Denson.

Q. Do you remember approximately about the date of these occasions?

A. I know one was in December. [353]

Q. 1945?

A. 1945. The other was prior to that and may have been in August, I wouldn't want to say. Mr. Denson has the record in his hotel register and can tell you.

Q. And were any suggestions made to you upon either one of these occasions as to a modification or change of any of the plans submitted?

(Testimony of T. P. Moorehead.)

A. Yes, there were.

Q. Do you recall what suggested changes Mr. Denson made? A. Mr. Denson——

Mr. Cooke: Just a moment. I interpose an objection on the part of the defendants, your Honor, that this is hearsay; that Mr. Moorehead is their agent for the purpose of constructing the building but not their agent for the purpose of making the contracts for them or affecting their contractual relations with Mr. Denson or anybody else; that any discussions had between Mr. Moorehead and Mr. Denson, on the occasion mentioned being, one of them, being apparently prior to the signing of the agreement and the other being subsequent are equally inadmissible, do not constitute any legal evidence as to whether there was any contract that this Court is authorized to specifically enforce or not.

Mr. Platt: I want to state to your Honor, that my intention to interrogate Mr. Moorehead as I have and to further interrogate him is to ascertain whether Mrs. Mapes [354] approved any part or portion of the suggested changes and plans made by Mr. Denson, thereby connecting her definitely up with the changes. I haven't had the privilege of discussing with——

The Court: What is the date of this transaction?

Mr. Platt: One was some time in August, we think it was August 31, 1945, and the other was in December, according to the statement of the witness.

(Testimony of T. P. Moorehead.)

The Court: Objection will be overruled and answer the question.

(Question read.)

A. Yes.

Q. What were they?

A. Mr. Denson wanted one room less on Virginia Street than we had shown, one room less on the river frontage.

Q. Did he tell you why he wanted those changes?

A. Because he wanted them larger.

Q. He wished the remaining rooms larger?

A. Yes, that is right.

Q. And do you recall any other suggested changes he made? A. No, I don't.

Q. Was this suggestion of his later adopted by you, with the approval of Mrs. Mapes?

A. I called up Mrs. Mapes and asked her if she would approve if I were to make the rooms larger.

Q. What did she say?

A. She said, "Yes, of course; I always wanted them larger."

Q. Don't you recall, or do you recall, Mr. Moorehead, that upon one of these interviews in Visalia that Mr. Denson not only made suggestions as to the size of the rooms, but likewise as to the size of the closets and that another elevator be added?

A. I do not remember Mr. Denson made those suggestions. We talked about making larger closets if possible. As regards additional elevator, Mrs.

(Testimony of T. P. Moorehead.)

Mapes said she wanted an additional elevator, also to provide an additional elevator in those plans we were developing at that time.

Q. Do you recall whether or not you discussed with Mr. Denson when you visited him on those two occasions in Visalia the question of increasing the size of the closets and putting in an additional elevator?

A. It may have been discussed. I wouldn't say that I recall the elevator was discussed. The closets were discussed.

Q. You remember now discussing the closets?

A. I remember discussing the closets, yes, I don't know whether at that particular meeting. It may have been at some other meeting. He urged as large closets as we could possibly get. Mrs. Mapes also urged as large closets as we could get. Whether Mrs. Mapes or Mr. Denson initiated it, I don't know.

Q. But the plans you had made available for both Mrs. Mapes [356] and Mr. Denson provided for smaller rooms, smaller closet space and likewise two elevators instead of three?

A. The plans as made at that time were two elevators instead of three.

Q. And subsequently, after you talked with Mr. Denson, these changes were made?

A. They were made at some subsequent date, yes.

(Testimony of T. P. Moorehead.)

Q. And the changes were made in your plans with the approval of Mrs. Mapes?

A. That is right.

(Recess taken at 12:00 noon.)

Wednesday, October 30, Afternoon Session

2:30 P.M.

All attorneys present as at previous session.

Mr. Moorehead resumed the witness stand on further direct examination by Mr. Platt.

Q. Mr. Moorehead, will you state whether there was any change in the plans of the so-called sky room of the hotel?

A. It had changes in it, yes.

Q. Did you discuss these changes with the plaintiff, Mr. Denson?

A. Yes, I discussed them with Mr. Denson.

Q. And do you recall about when and where this discussion took place? [357]

A. I think it was in January of '46, this year.

Q. And where did it take place?

A. I think it was in my office in Oakland.

Q. Do you recall who, if any one else, was present besides you and Mr. Denson?

A. No, I don't.

Q. Do you recall what suggestions he made with respect to the change of plans of the sky room?

A. Mrs. Mapes had talked to me——

Mr. Cooke (interrupting): He just asked if you recall.

A. If I recall?

(Testimony of T. P. Moorehead.)

(Question read.) A. No, I don't.

Q. You don't?

A. I don't recall the suggestions Mr. Denson made.

Q. Didn't you state he made suggestions as to the change in the sky room plan?

A. Well, I don't know just what those were. He may have made some suggestions. There were various changes made at all times. One thing was the check room in the sky room. We did discuss a change of the sky room.

Q. Isn't it a fact, Mr. Moorehead, that the original plans of the sky room called for a curved indentation and that upon Mr. Denson's suggestion the plans were changed so as to [358] level it up and extend the width of the sky room?

A. Those were not Mr. Denson's suggestions. Mrs. Mapes' suggestion. Mrs. Mapes wanted from the very start to have that sky room cover all the whole floor and I fought against it. I thought the sky room was large enough and we discussed those things with Mr. Denson.

Q. Well, you said that Mrs. Mapes first made the suggestion?

A. From the very beginning Mrs. Mapes wanted the sky room larger and I argued it was adequate, quite large enough. Now I discussed those things with Mr. Denson and Mr. Denson concurred in Mrs. Mapes' view.

Q. What did Mr. Denson say with respect to

(Testimony of T. P. Moorehead.)

the suggestion which you say originally came from Mrs. Mapes?

Mr. Cooke: Objected to as irrelevant. The contract is signed by the parties in writing and therefore any oral testimony in regard to talk on these different occasions, as we see it, would not be admissible.

The Court: Objection will be overruled. The witness may answer the question.

(Question read.)

A. He agreed that it should be larger.

Mr. Cooke: What should be larger?

A. The sky room.

Q. Did Mrs. Mapes suggest to you that you take up the change in the sky room with Mr. Denson?

A. No.

Q. How did you happen to do it?

A. We were discussing plans. We discussed all the various phases of the plans. Mr. Denson was to be one of the lessees of the hotel.

Q. You understood that all the time?

A. I understood that, yes.

Q. And when there were any changes in plans you always discussed those changes with Mr. Denson?

A. Any changes pertaining to the hotel proper, yes.

Q. Did you ever tell Mrs. Mapes that you had conferred with Mr. Denson with respect to the change of the plans of the sky room?

(Testimony of T. P. Moorehead.)

Mr. Cooke: My objection may go to all of this?

The Court: Yes, the same objection may apply and the same ruling.

(Question read.)

A. I do not recall that I specifically told Mrs. Mapes that I had also spoken to Mr. Denson about it. Mrs. Mapes requested it, but I don't recall ever telling Mrs. Mapes specifically that I talked to Mr. Denson about it.

Q. But do you remember that you submitted modified plans, changing the arrangement of the sky room, to Mrs. Mapes? A. Yes, I did.

Q. Did you meet Mrs. Mapes in Sacramento, California, some [360] time during the months of August or September, 1945?

A. Not 1945—yes, 1945, that is right. I did. I met Mrs. Mapes in Sacramento.

Q. How was that appointment made?

A. It was arranged with the insurance company—

Q. I mean how did you arrange with Mrs. Mapes to meet her in Sacramento?

A. I telephoned her and asked her if she could meet me there.

Q. And do you remember about when she did meet you there?

A. It was around August, 1945.

Q. Did you tell her why you wanted her to meet you there? A. Yes.

Q. What did you tell her?

(Testimony of T. P. Moorehead.)

A. I told her in connection with the loan.

Q. In connection with the loan?

A. In connection with the loan for the hotel.

Q. Did you ever hear Mrs. Mapes and Mr. Denson discuss between themselves the question of a loan on the hotel? A. Yes.

Q. And when, if you recall, did that discussion take place?

A. I think it was in September. It was after we were in Sacramento.

Q. After you were in Sacramento?

A. Yes.

Q. What did you and Mrs. Mapes do with respect to the loan [361] when you were in Sacramento, in August you say?

A. We interviewed the loan representative of one of the insurance companies.

Q. Did you get the loan?

A. You couldn't get a loan on something that wasn't definite.

Q. But you didn't get the loan? A. No.

Q. And you say you heard a discussion after that time between Mrs. Mapes and Mr. Denson concerning a loan on the hotel?

A. Mrs. Mapes and Mr. Denson and I discussed the question of a loan on this hotel, yes.

Q. When did that discussion take place?

A. It was around September, 1945.

Q. Do you remember where it was, Mr. Moorehead?

A. It may have been at that meeting in San

(Testimony of T. P. Moorehead.)

Francisco. It must have been one of the meetings where Mrs. Mapes, Mr. Denson and I were all together and the only times we were together was in San Francisco in August and September of 1945. At one of those meetings we talked about loans.

Q. Do you recall what was said by you and Mrs. Mapes and Mr. Denson upon that occasion?

A. We——

Mr. Cooke: The question is whether you recall it.

A. Do I recall? Slightly, yes.

Q. Well, repeat the conversation as nearly as you remember it. [362]

Mr. Cooke: Objected to as incompetent, irrelevant, and immaterial for the reasons heretofore stated.

The Court: Same ruling. You may answer the question.

A. At the meeting with the Occidental Life Insurance Company in Sacramento Mr. Wright told us that they were interested in placing the loan but that was larger than the Occidental Life Insurance Company could handle but that they could handle it—I mean the California Western States Life Insurance Company at Sacramento, head office in Sacramento. Mr. Wright informed me and Mrs. Mapes that in cooperation with the Occidental Life Insurance Company of Los Angeles that he thought the loan could be placed on the building as contemplated at that time. At our meeting with Mrs. Mapes and Mr. Denson we discussed approaching

(Testimony of T. P. Moorehead.)

the Occidental Life Insurance Company directly and Mr. Denson suggested that as Mr. Gock was a friend of his, he is president and chairman of the board of the Bank of America, who owns the Occidental Life Insurance Company, that possibly the approach better be through Mr. Gock and that is what we discussed in regard to a loan on this building.

Q. Do you recall what conclusion was reached by you and Mrs. Mapes and Mr. Denson with respect to Mr. Denson conferring with Mr. Gock?

A. That Mr. Denson would confer with Mr. Gock.

Q. That was your general conclusion? [363]

A. That was the conclusion, yes.

Q. Well, did either Mr. Denson or Mrs. Mapes inform you as to whether Mr. Denson did confer with Mr. Gock?

A. Mr. Denson informed me that he had conferred with Mr. Gock?

Q. When did he tell you that?

A. In Los Angeles.

Q. Do you remember what else he said?

A. That Mr. Gock had telephoned the president of the Occidental.

Q. Mr. Clark?

A. Mr. Gock informed Mr. Clark that Mr. Denson and I would come over and see Mr. Clark.

Q. Did you go over and see him?

A. We did.

Q. About when was that?

(Testimony of T. P. Moorehead.)

A. September, 1945, early September, I would say, because it was before Mr. Denson had made his contract with Mrs. Mapes.

Q. What was said by Mr. Denson and you and Mr. Clark upon that meeting in September, as nearly as you remember?

Mr. Cooke: The same objection, incompetent, irrelevant and immaterial, as to negotiations and matters prior to the signing of the document. Same objection.

The Court: Same ruling. You may answer the question.

A. We discussed the cost and the loan required. Mr. Clark [364] said he couldn't tell us whether he could make a loan or not but that he would send a representative of the Occidental Life, Mr. Brougher, to Reno to investigate it.

Q. Did any one mention to Mr. Clark the amount of the loan required? A. Yes.

Q. Who mentioned that?

A. Either I or Mr. Denson.

Q. Either you or Mr. Denson?

A. I think I told him how much we required at that time.

Q. How much did you say?

A. Six Hundred Fifty Thousand.

Q. Well, did Mr. Denson ever talk to you again as to whether the loan would be granted?

A. Not as to whether the loan would be granted, no, Mr. Denson never spoke to me about it.

(Testimony of T. P. Moorehead.)

Q. Did you ever have any discussion with Mr. Denson again concerning the loan?

A. Yes.

Q. When was that?

A. After I had seen the Occidental Life Insurance Company a couple of times.

Q. And what did the Occidental Life Insurance Company, through their proper representative, tell you?

A. They told me that they would be interested in making a [365] loan here of six hundred thousand dollars.

Q. Did you communicate that to Mrs. Mapes?

A. Yes.

Q. Did you tell Mrs. Mapes about your and Mr. Denson's interview with the representative of the Occidental Life?

A. I told Mrs. Mapes of my dealing with Mr. Clark. Mr. Denson and I, so far as I remember, had one interview with Mr. Clark.

Q. But you communicated the conclusion of the Occidental Life to Mrs. Mapes? A. I did.

Q. As I understand it, you said that they agreed to grant a loan of six hundred thousand dollars?

A. Not to the amount we asked.

Q. What was it?

A. We were asking six hundred fifty thousand and they said they would only grant six hundred thousand.

The Court: I would like to clear something in my mind. You spoke of their being interested in a

(Testimony of T. P. Moorehead.)

loan of six hundred thousand. Mr. Platt's question contemplated that they had agreed to the loan.

Mr. Platt: Well, they agreed to grant it to the extent of six hundred thousand.

A. No, they said they were interested in a loan of the amount [366] of six hundred thousand. They would have to make a thorough investigation before they would make a loan.

Q. Did you later interview the Occidental after they made that statement?

A. No. I say no—I will modify that. I say no—until the progress of the building plans had been amplified and extended, perhaps six months later, that I told them then what our requirements were.

Q. My attention, Mr. Moorehead, has just been called to a document, a copy of which I believe was prepared by you. Can you identify it as having been prepared by you?

A. Yes, that was prepared by me.

Q. Well, in order to lay the foundation for the identification, it is your own financial estimate for building the hotel?

A. I made that up as a financial plan for the construction of the hotel building, the financing and construction of the building.

Q. I call your attention—I think, if the Court please, we will offer it in evidence. Strike the last question. If the Court please, I will withdraw the offer of introduction. There is one question I would like to ask about it.

(Testimony of T. P. Moorehead.)

Q. I call your attention, Mr. Moorehead, to Statement of Finances. In order to refresh your recollection, isn't it true that the extent of the loan desired was a 625 thousand instead of 650 thousand?

A. No, I think we submitted 650 thousand because I think we raised the cost of the building from 860 to 885 thousand. Whether there was a subsequent statement submitted to the Occidental Life, I would have to look in my own files to see, but this was a statement I made to Mrs. Mapes, showing just what the cost, earnings, expenses and net income would be on the building. My recollection is that we asked 650 thousand dollars from the Occidental Life. We prepared several of these statements from time to time as additions and deductions, mostly additions, were made to the building.

Q. When you applied for the loan to the Occidental Life Insurance Company, to their representative, did you submit any plans?

A. We submitted sketch plans, sketches, preliminary plans; in other words. not detailed drawings.

Q. I hand you five sheets of blueprints and ask you if those are the plans you submitted?

A. I think they were.

Q. Did you ever have a phone conversation with Mrs. Mapes wherein, in substance, she inquired of you why Mr. Denson had not gotten in touch with Mr. Gock?

(Testimony of T. P. Moorehead.)

A. I don't recall any such phone conversation.

Q. Do you recall any conversation with Mr. Denson, wherein he stated that he couldn't begin negotiations for a loan until he had his contract with Mrs. Mapes? [368]

A. I don't recall any such conversation.

Q. You don't recall any such conversation?

A. No, no such conversation.

Q. Isn't it a fact, Mr. Moorehead, that he did tell you that he would approach Mr. Gock and attempt to get the loan and negotiate it after he received his contract from Mrs. Mapes?

A. I don't recall him telling me that.

Q. Subsequent to October 4, 1945, when this contract was executed, did you meet Mr. Denson in Visalia, California?

A. Yes, I met him in December of 1945 in Visalia.

Q. And about when in December?

A. About two days before Christmas.

Q. How did you happen to meet him there at that time?

A. I was on my way to Los Angeles and stopped to show Mr. Denson my progress we had made with our working drawings.

Q. And what did you show him as to the progress you had made? A. I showed him the plans.

Q. The plans that had been——

A. (Interrupting) Floor plans.

Q. Floor plans of the hotel that had been drawn and agreed upon up to that time? A. Yes.

(Testimony of T. P. Moorehead.)

Q. Did you do that voluntarily or was it at Mr. Denson's suggestion?

A. It was voluntarily. I was going down to Los Angeles and [369] stopped there on my way down.

Q. Do you recall about how much time you spent with Mr. Denson at that time?

A. Oh, I got into Visalia about 7:30 o'clock; I should say from about 8:30 until about 11—2½ hours.

Q. And for 2½ hours you discussed the plans that were in your possession?

A. The plans and other matters too. Most of the time on plans, yes.

Q. Do you recall at that time and at that interview whether Mr. Denson made any further suggestions as to modifications or changes in the plans?

A. The change I have already told you about, about omitting one room on the river and one room on Virginia Street.

Q. And did you communicate that suggestion to Mrs. Mapes? A. I did.

Q. And was it approved, adopted?

A. I have already answered that question.

Q. Well, I am sorry.

A. She said, "Of course I want the room larger."

Q. During the month of December, or to be a little more nearly exact, on or about the 28th day of December, 1945, did you have a meeting at which Charles W. Mapes, Mr. Denson, and others were present?

(Testimony of T. P. Moorehead.)

A. After Mr. Denson made this suggestion to make these rooms [370] larger, we had a meeting in my office. Just what the date was I can't tell you. It was within a couple of weeks after I was in Visalia.

Q. Do you remember whether it was before or after Christmas?

A. It was after Christmas, yes, because I was in Visalia three days before Christmas. Just the exact date I couldn't tell you because we had to develop plans after Mrs. Mapes had told me to diminish the number of rooms and make them larger, we had to revise our plans and I wanted to discuss those plans as revised with Charles and Mr. Denson.

Q. And do you recall who arranged that meeting in your office in Oakland?

A. I initiated it.

Q. You did? A. I initiated it.

Q. And how did you inform Charles W. Mapes, Jr., and Mr. Denson about the meeting?

A. Probably by telephone.

Q. Do you recall who, if any one else, was present, Mr. Moorehead, beside you and Charles W. Mapes and Mr. Denson, at that meeting?

A. Mr. Slocum I think was present.

Q. The architect?

A. Yes, Mr. Slocum was associated with me in making these plans. From time to time I called our different draftsmen in, [371] Mr. Day, I think,

(Testimony of T. P. Moorehead.)

but I don't recall definitely whether he came in on any of the discussions or not.

Q. Do you remember about what time of the day that discussion started?

A. No, I don't. Probably in the morning, probably about ten o'clock.

Q. Do you remember how long it continued or lasted?

A. Most of the morning.

Q. Do you remember whether Mr. Denson made any additional suggestions to the plans which you submitted upon that occasion?

A. At that time I do not think so. I do not remember if he did but I do not think there were any additions made besides incorporated in the plans.

Q. Did the defendant, Mr. Charles W. Mapes, Jr., participate in the conversation?

A. He did.

Q. I don't suppose you recall anything he said?

A. No, we were in agreement.

Q. All in agreement?

A. Pretty well in agreement as to what was to be done.

Q. By that you mean all the parties present?

A. I mean Mr. Denson, Charles and myself and Mr. Slocum.

Q. Upon that occasion was there any statement made by Mr. Denson to the effect that he was working with certain firms [372] for the purpose of

(Testimony of T. P. Moorehead.)

supplying furniture and fixtures, etc., for the hotel?

A. I don't recall.

Q. You don't recall?

A. I don't recall. The plans were not finished at that time. It was a little bit premature to take things up in any detail with the furniture establishments.

Q. So your answer is you just haven't any recollection?

A. I have no recollection of making that observation, no.

Q. Well after these plans were agreed upon, did Mr. Denson inform you that he was working with certain California firms for supplying furniture and equipment? A. He did.

Q. And when did those conversations take place?

A. He asked me for some plans so that he could give them to the furniture establishments.

Q. Did he tell you the names of any of the firms?

A. Yes.

Q. What were they?

A. He mentioned the name of W. J. Sloane, Barker Bros., Mangrum, Holbrook & Elkus, Dohrmann Hotel Supply Company.

Q. Did you comply with his request and give him the plans? A. I gave him the plans.

Q. It has been suggested that I ask you how soon after the agreement of October 4th was signed was it that Mr. Denson [373] first discussed preparing for the furniture and fixtures?

A. Mr. Denson mentioned to me some time dur-

(Testimony of T. P. Moorehead.)

ing the period from the time I gave him the plans and October 4th that he would like the plans to give to these furniture establishments.

Q. Now was that before the contract was signed?

A. It was between October 4th when the contract was signed——

Q. Yes.

A. ——and January when I gave him the plans. He mentioned he would like plans to give to these people so he could get his furniture lined up.

Q. Did you ever have any discussion or conversation with Mr. Denson with respect to furnishings and fixtures, etc., in the presence of Charles W. Mapes or Mrs. Mapes?

A. In the presence of Charles, yes.

Q. And when did that happen?

A. I couldn't tell you exactly whether it was after I gave Mr. Denson the plans or before, probably before, because I would not have given the plans to Mr. Denson without being permitted to.

Q. And from whom did you require permission?

A. Probably Charles. Probably up here, when I came up here during December or January I mentioned the plans were required by Mr. Denson.

Q. Please state, Mr. Moorehead, whether on or about the first day of April, 1946, there was another meeting in your office [374] at Oakland with persons interested in the hotel project? A. Yes.

Q. And do you know the exact date of that meeting?

(Testimony of T. P. Moorehead.)

A. From memory I do not, only from what they said here, but it was about April 1st, 1946.

Q. This year? A. This year, that's right.

Q. Do you remember who were present at that conference?

A. Charles, Mr. Denson, Mr. Slocum, Miss Mason of Barker Bros. and myself. I do not think of any other representative of Barker Bros beside Miss Mason.

Q. Do you know how that meeting was arranged; I mean, of your own knowledge do you know? How did they happen to meet in your office?

A. Well, Mr. Denson told me that he was bringing Miss Mason to San Francisco and that he was asking Charles to be present.

Q. Do you recall about what time in the morning they all met?

A. About ten o'clock I think.

Q. What was done generally at that meeting, without going into too much detail?

A. We looked at the plans.

Q. You mean the plans of the hotel?

A. I mean the plans that Miss Mason had brought and Mr. Slocum and I both decided that they were not anything that we wanted, so far as the hotel—the suggestions they made were not [375] proper at all and we told Miss Mason and we told Mr. Denson that we were developing the coffee shop and the sky room and that we would lay out the coffee shop and sky room and when we had them laid out would ask them to figure on it, but

(Testimony of T. P. Moorehead.)

we were not interested in the lay-out of the coffee shop Miss Mason made.

Q. How about the rest of the hotel?

A. The rest of the hotel, the kitchen, we looked at the plans of their kitchens. The style of the kitchen, I remember, was absolutely inappropriate. The first floor kitchen had some merit to it but we didn't want the plans because we were not in a position to either approve or disapprove them at that particular time.

Q. Well these plans that were submitted by Miss Mason of Barker Bros. were quite detailed plans, weren't they?

A. No. They were just lay-outs somewhat along the order of those sketches which we had made.

Q. Well, without taking up the time of the Court, Mr. Moorehead, you were present, weren't you, when we introduced in evidence the plans submitted?

A. I saw them from a distance, I didn't examine them, but I presume they were the same plans. They were quite extensive.

Q. They were quite extensive?

Q. Quite extensive plans of the rooms and how the furniture would be laid out, plans of the coffee shop, how the coffee [376] shop would be laid out.

Q. And Charles Mapes, along with the rest of you, discussed those plans?

A. We discussed those plans. We wasted our time there.

Mr. Platt: That is conclusion, your Honor.

(Testimony of T. P. Moorehead.)

Q. All I want to know is whether you participated in the discussion? A. I participated.

Q. And whether Charles W. Mapes participated in the discussion? A. Yes.

Q. And whether Mr. Denson, the plaintiff, did?

A. Yes.

Q. State whether or not you made any commitment to Mr. Denson at any time when your final plans were finished that you would submit them to him?

A. I was not required to submit the final plans to Mr. Denson. I submitted the final plans to Mrs. Mapes.

Q. Well, it was your understanding, wasn't it, and it had been your custom, hadn't it, to submit plans to Mr. Denson, copies of them, to get his reaction and view?

A. I discussed the plans with Mr. Denson, yes, in December.

Q. And that continued until you were subsequently prevented from doing it?

A. That is right. [377]

Q. Do you recall any statement made by the defendant, Charles W. Mapes, with respect to the sky room at this conference you said was held in your office in Oakland on or about April 1st, 1946?

A. I do not recall any particular statement by him. We discussed the lay-out—what date, December did you say?

Q. About April 1, 1946.

A. We discussed the lay-out that Barker Bros.

(Testimony of T. P. Moorehead.)

had submitted. Just what Charles said in connection with it, I don't recall any particular thing that he said. In fact, I told Charles it was not what we wanted, wasn't anything near what we wanted.

Q. Well, isn't it a fact that Charles W. Mapes said in effect that he didn't want to decide anything with respect to the sky room?

A. I don't recall Charles saying that at that time.

Q. Well, do you recall his having made that statement any other time?

A. Charles had all his business in consultation with his mother. If he made a statement at any time that he did not want to decide, it would be because he wanted to take it up with Mrs. Mapes before making a decision.

Q. Do you recall that Charles W. Mapes said to you at any time that he didn't want to make any final decision with reference to the furnishing of the sky room or the equipment of it?

A. No, I don't recall Charles making that statement. [378]

Q. After this discussion in your office on April 1, 1946, when did you next see Mr. Denson?

A. I think it was some time during April.

Q. Where did you see him?

A. I think at the Sir Francis Drake Hotel in San Francisco.

Q. And what was said at that interview or meeting?

(Testimony of T. P. Moorehead.)

Mr. Cooke: Objected to as hearsay, irrelevant and immaterial.

Mr. Platt: Well, of course, with respect to the hotel operations, your Honor.

The Court: Objection will be overruled. Answer the question.

A. He told me that he and Charles were not going in on the lease, that Charles refused to enter into an agreement with him.

Q. Did he make any request at that time for you to furnish him with any additional plans?

A. Yes.

Q. What did he say?

A. He asked that we give him additional plans as they now had been developed.

Q. And you say that was some time early in April of 1946?

A. Some time in April, I should say.

Q. When he asked you for those additional plans, what did you reply? [379]

A. I told him I couldn't give him any.

Q. Did you tell him why you couldn't give him any?

A. Yes, I did.

Q. Well, what did you say?

A. I told him Mrs. Mapes and Charles had requested me not to give any more plans to Mr. Denson.

Q. Did you tell him anything else?

A. I do not think so.

Q. As a matter of fact, did you come to Reno early in April, Mr. Moorehead?

(Testimony of T. P. Moorehead.)

A. Sure I did. I have been in Reno two or three times every month since that hotel was started.

Q. Who accompanied you to Reno?

A. In April?

Q. Yes, early in April of 1946?

A. I don't recall anybody accompanying me except possibly my wife.

Q. Well, did you see Mrs. Mapes and Charles when you came to Reno upon that occasion?

A. Yes.

Q. Did you also meet Mr. Denson afterwards?

A. I don't recall meeting Mr. Denson after April 1st in Reno.

Q. Did you see Mr. Denson after that in San Francisco? A. Yes.

Q. And about when was that? [380]

A. I already told you I recall seeing Mr. Denson some time in April of 1946. Whether it was after that or before that I couldn't tell you.

Q. Did you tell him then that you had had a conversation with Mrs. Mapes and Charles W. Mapes, Jr.? A. Yes.

Q. Did you tell him what they said to you?

A. No.

Q. Well, didn't you tell him what the conversation was between you and Mr. and Mrs. Mapes?

A. No, I came to Reno to discuss the construction of this building among other matters.

Q. You saw Mr. Denson, didn't you, in San Francisco or in Oakland I should say, some time in June, 1946?

(Testimony of T. P. Moorehead.)

A. I have seen Mr. Denson perhaps half a dozen times since April, 1946. I can't recall the exact dates.

Q. Well, do you recall having met him in your office in June, 1946?

A. I can't say in June, Mr. Denson has been in my office about twice or three times since April, 1946.

Q. Well, in order to refresh your recollection, you had information, didn't you, that a suit had been brought against Mr. Denson by Mrs. Charles W. Mapes and others? A. Yes.

Q. And did you or did you not make an arrangement with anybody [381] so that Mr. Denson would appear at your office and be served with process in that action? A. I did not.

Q. But you knew that Mr. Denson was to be present in your office some time in June, 1946?

A. Yes, because I told Mr. Denson over the phone, I said I would like to see him. I also told Mr. Denson that Charles was coming over.

Q. That was in June, 1946?

A. It was at the time that this process was served on Mr. Denson. Is that in June?

Q. Well, did you phone Mr. Denson and ask him to come to your office on that occasion?

A. Mr. Denson wanted to discuss things with me and I wanted to discuss with Mr. Denson because Mr. Denson thought I was opposed to him.

Q. I am trying to find out if I can, Mr. Moorehead—you can answer either yes or no—did you

(Testimony of T. P. Moorehead.)

phone Mr. Denson and arrange to see him at your office? A. I did.

Q. The latter part of June, 1946?

A. I don't know. When was this suit instigated?

Q. The latter part of June, 1946.

A. Well, then, it was at that time that I saw Mr. Denson, that I phoned Mr. Denson. [382]

Q. Isn't it a fact that Mr. Denson was served with process while he was in your office?

A. No.

Q. Well, did you have any knowledge that he was served?

A. Yes, because after he left my office he came into the office and thanked me for being served.

Q. Thanked you for being served?

A. That's right, and he walked out.

Q. Didn't you feel that that was a little bit of sarcasm?

A. Yes, I did. He didn't take the time to explain but I wasn't responsible for his being served.

Q. Do you know how it happened that the process server knew that Mr. Denson was to be in your office at that time?

A. Unless Charles had given him information that he would be there.

Q. Do you know where Charles got that information?

A. Charles got that information from me.

Q. And what did you tell Charles?

A. In the morning I told Charles Mr. Denson was coming into my office that afternoon.

(Testimony of T. P. Moorehead.)

Q. And do you know whether Mr. Denson was served with process in the morning or in the afternoon?

A. I think it was in the afternoon.

Q. Do you know if he was served with process after you told Charles or before? [383]

A. It was after I told Charles.

Mr. Platt: If the Court please, I think that is all for the present.

The Court: Cross-examination, gentlemen?

Cross-Examination

By Mr. Cooke:

Q. Mr. Moorehead, your connection with the construction of the Mapes Hotel, so far as actual work is concerned, began when?

A. November 13, 1946. 1945 we had our superintendent——

Q. (Interrupting): And what did that work consist of, the first work that you did?

A. Putting the protection work around the property and starting in the demolition of the building.

Q. That was included in your job, in your contract with the Mapes Company? A. Yes.

Q. The demolition of the building was the old postoffice building, known as the old postoffice building? A. Yes.

Q. A brick building? A. Yes.

Q. How long did it take to demolish that and

(Testimony of T. P. Moorehead.)

get it out of the way? A. About a month.

Q. How soon after you began the work of demolition on the old building did you see Mr. Denson or talk to him about what was going on up here in Reno?

A. I do not believe I saw Mr. Denson until December 22nd or 23rd.

Q. State, if you know, whether Mr. Denson knew from anything that you said to him or otherwise that the work had been commenced on the demolition?

A. Well, Mr. Denson knew that demolition had been commenced.

Q. How did he know?

A. Well, one thing I think Charles had written him and I may have talked with him——

Mr. Platt: I ask that that part of the answer be stricken, "Charles had written him."

Mr. Cooke: No objection.

Q. Did you have any conversation with Mr. Denson in regard to the work having been started or being under way or the like?

A. I probably did by telephone or by personal conversation.

Q. What I want to find out is your recollection, or best recollection, whether you did or you didn't?

A. I don't recall.

Q. How soon after you began the work of demolition do you recall having a conversation with Mr. Denson about the work?

A. December 22nd and 23rd.

(Testimony of T. P. Moorehead.)

Q. And where was the conversation? [385]

A. That was in Visalia.

Q. You already told us about the visit?

A. I already told you.

Q. You stopped off there 2½ hours you said, I believe?

A. Yes.

Q. And on that occasion I believe you said you spent a portion of the time discussing some plans you had?

A. That is right.

Q. And those plans were of what?

A. This building here.

Q. What do they show?

A. They show all the floors, the floor plans.

Q. Those floor plans, how long had they been prepared?

A. They were in the process of being prepared at that time. They were not completed, but they were in the process of preparation and quite a lot done on them.

Q. On this visit to Visalia was the matter of the work on the building discussed?

A. We talked about it, how we were getting along.

Q. Do you remember what was said as to what you were doing or what your company was doing?

A. I told Mr. Denson that the demolition was probably completed at that time, December 23rd, and that the excavation was in progress and that we soon expected to start putting in the foundations.

Q. The taking down of the walls of the old post-

(Testimony of T. P. Moorehead.)

office building only took a portion of those 30 days you mentioned? A. Yes.

Q. The balance was excavating for the foundation?

A. No, the excavation for the basement was started before the walls were all taken down. We started excavation about the middle of December.

Q. Well, did you state to Mr. Denson the substance of what you have just told us about the progress of the work?

A. I did. I told Mr. Denson when I was in Visalia what progress we had made, yes.

Q. Your connection with the whole business there was construction engineer, wasn't it?

A. Well, our business is that of manager and designing and construction of the building. We contract and design the plans and the construction of the building.

Q. That was your contract with the Mapes Company in connection with this building?

A. Yes.

Q. And you spend about how many days, we will say, per month from the time you began down to the present time in Reno on this job?

A. On this job, oh, fully one-third of the working days I have been in Reno since we started this building.

Q. I didn't quite get that. [387]

A. Fully one-third of the period between last November, 1946, and today I have been in Reno.

(Testimony of T. P. Moorehead.)

Nearly 300 working days—I have been here perhaps 100 working days altogether.

Q. Does the time that you put in here in Reno, during this time that you are here that you described, does that apply to all the work you have to do in connection with the job of constructing that building?

A. Oh, no. When I am in Oakland I am engaged on construction of this building.

Q. What work do you do in Oakland two or three hundred miles away by way of constructing a building in Reno?

A. We prepare plans, we arrange for the purchasing of materials, always takes a lot of time, we also expedite to see that things are coming through.

Q. How about hiring of men? Do you have anything to do with that down there?

A. Some of the men employed have been employed here, some in Oakland.

Q. Is the matter of obtaining materials of considerable difficulty or not?

A. Yes, it is difficult.

Q. You handle that largely from your Oakland office, do you?

A. No, I would say equally between the Oakland office and here.

Q. And who have you on the job to superintend, etc., while [388] you are not here?

A. Well, the superintendent on the building is Mr. Huck.

(Testimony of T. P. Moorehead.)

Q. He has been on there from the beginning?

A. He has been there from the beginning.

Q. He is there now?

A. Yes. We have other men too.

Q. When, if you recall, did you have the first conversation with Mr. Denson about his interests as prospective lessee or otherwise in the building?

A. That would be when I first met Mr. Denson in Los Angeles in 1944, May or June, 1944.

Q. Well, I should ask my question a little differently. When, after September 24, 1945, did you have your first conversation with Mr. Denson in regard to the building and discussion with him as to plans or the like?

A. I don't recall the date, Mr. Cooke. I saw Mr. Denson most of the time that he came to Los Angeles from Visalia on matters. He would call me up and I talked with him about project.

Q. Did he ever tell you along in September, October, or November, 1945, that he had a contract with Mrs. Mapes? A. Yes, he did.

Q. When did you first hear of that from him?

A. He showed it to me in Los Angeles in October, the latter part of September or October, 1945.

Q. And do you remember what discussion was had in regard to the document?

A. He asked me to read it over and I read it over and I made the observation that he was guaranteeing the income from the building without the stores and he said that observation had also been made by some one else, that some one else had also

(Testimony of T. P. Moorehead.)

made that observation and he was going to have it corrected.

Q. Was there anything else discussed or mentioned by him or by you with regard to the September 24th agreement?

A. I don't recall any other particular items, no. I only just read it over, I didn't study it, went through it and I asked Mr. Denson if that was his intention and he said it was.

Q. Did you have any discussions with him before this as to his obtaining a lease on the hotel without the stores or with them?

A. Any discussions I had were always without the stores.

Q. His lease or whatever he got was to be without the stores?

A. Without the stores, yes, as far as I had any talk.

Q. The discussion that came up at this time was not with respect to the stores being excluded, but with regard to their being included for the purpose of figuring his guaranteed minimum, is that right?

A. That is right.

Q. You called that to his attention? [390]

A. I called that to his attention.

Q. Just what did you say?

A. He said that was his intention too, that the income from the stores was to be included in the guaranteed income.

Q. Was anything said as to how the matter of

(Testimony of T. P. Moorehead.)

the income from the stores that were not included in the lease was to be controlled or handled?

A. No.

Q. Was the matter of this particular document discussed in any other respect, any of the other clauses of it at that time I mean?

A. We may have talked about one or two of the other clauses, but I don't recall what they were.

Q. Did he express any dissatisfaction or satisfaction with the paper in general?

A. No, that was the only item I recall that was under question.

Q. How did he say he was going about to correct that?

A. That he would make the correction and get in touch with Mrs. Mapes.

Q. Do you know whether he did or not?

A. Yes, he did.

Q. How do you know?

A. Well, the fact that the document was subsequently signed by all of them. Also I knew before because he had told me and Mrs. Mapes had told me.

Q. How soon after this October 4th was it that you saw the [391] document that you recall?

A. I don't think I ever saw the document again after October 4th until this last week.

Q. Do you remember how that particular clause was changed? Did you learn anything about that before it came into court here, how that clause was changed?

A. No, I never knew how it was changed.

(Testimony of T. P. Moorehead.)

Q. Did you ever receive any instructions from Mrs. Mapes or Charles W. Mapes, Jr., to discuss and obtain the approval of Mr. Denson to the maps and drawings and details, etc., as the construction work went along?

A. I never received any instructions from them.

Q. In what way then did it come about that you did discuss with Mr. Denson the plans and drawings, etc., as you have already detailed?

A. Mr. Denson had this agreement with Mrs. Mapes that provided that the agreement would be made and that he would operate the hotel and I didn't want to go too far with our plans without knowing just what Mr. Denson's actual connection with it was.

Q. Then so far as your taking up with Mr. Denson was concerned, that was prompted by your knowledge of this agreement?

A. By my knowledge of this agreement and by my interest in getting plans completed as quickly as possible and not doing a lot of work which might have to be changed. [392]

Q. Did Mr. Denson ever explain to you that he was entitled to receive plans and drawings, etc.?

A. I don't recall that he did, but it is our practice to submit plans to lessees.

Q. When, if you recall, was the first time that you discussed with Mr. Denson the subject matter of plans or drawings for the proposed hotel building? Is that this December meeting at Visalia?

A. Will you repeat that again?

(Testimony of T. P. Moorehead.)

Q. I think I want to change it, with your Honor's permission. When after September 24, 1945, did you first discuss with Mr. Denson the subject matter of plans and specifications, details and drawings of this hotel?

A. I can't remember any specific date but I did see Mr. Denson in Los Angeles between September 24th and the time my own contract with Mrs. Mapes was signed.

Q. What date was that?

A. November 6, 1945.

Q. You saw Mr. Denson in Los Angeles?

A. Saw Mr. Denson in Los Angeles. It may have been in October.

Q. Did you discuss with him the matter of plans and drawings, and the like? A. Yes, I did.

Q. Did you have any with you?

A. Yes, I had plans with me. [393]

Q. Who else besides you and Mr. Denson were present or participated in that talk?

A. I don't recall anybody else.

Q. Where did it occur?

A. In Mr. Denson's room at the Biltmore Hotel.

Q. Did you go down there specifically to see him?

A. I was living in Los Angeles at that time.

Q. What were the plans that you discussed at that time? What were the drawings or plans?

A. They were sketch plans, similar to these.

Q. What do you mean "these"?

(Testimony of T. P. Moorehead.)

A. I mean these plans that Mr. Platt just showed me. They were sketch plans. Between September 26th and November 6th we only made preliminary plans.

Q. They were prepared by you or under your supervision?

A. My supervision and cooperation of Mr. Slocum.

Q. They were not complete in any sense?

A. Not working drawings in the usual sense.

Q. Did you have any other business to take up with Mr. Denson about the size of these plans at that time? This meeting was merely for the purpose of discussing plans?

A. In October I had no contract with Mrs. Mapes. I was trying to secure a contract with Mrs. Mapes and I was discussing these with Mr. Denson with the idea of persuading Mrs. Mapes to enter into a contract with us. [394]

Q. You were trying to qualify yourself?

A. I wanted the job.

Q. That would be before November 10th?

A. Before November 6th, the date of my contract.

Q. Well, what did Mr. Denson have to say in regard to the plans that you had prepared at that time, as regards it being satisfactory or not? Did he criticize them or not?

A. Those plans he made no particular criticism about because we had previously discussed the

(Testimony of T. P. Moorehead.)

plans, which I had shown Mr. Denson from time to time.

Q. You had previous discussions? .

A. Prior to September 26th.

Q. Prior to September 24, 1945? A. Yes.

Q. Those conversations were conditioned on the part of both of you that you might get some interest in this hotel building? A. That is right.

Q. He getting some arrangement for a lease and you getting the job of putting the building up?

A. That is right.

Q. And you had discussed in sort of a tentative way the plans? A. That is right.

Mr. Sinai: Might I interpose an objection on the ground that counsel's statement is not in conformity with the [395] testimony given by the witness because counsel is referring to a period prior to September 24th and the witness testified it was from September 24th on through October and November, which is when he obtained——

The Court (interrupting): The answer of Mr. Moorehead went back to prior to September 24th?

Mr. Sinai: That is right, and counsel is now limiting it to September 24th.

(Question and answer read.)

Mr. Cooke: Do you understand now what I am asking? Let me ask you again and get this record clear. I am now asking about after September 24, 1945, and prior to the time you got your contract on November 6th. Had you had any discussions

(Testimony of T. P. Moorehead.)

with Mr. Denson in regard to plans, had you ever discussed them in any way with him?

A. Yes, I know I did because I saw Mr. Denson in the Biltmore Hotel when he had this agreement, he received this agreement.

Q. That was October 4th?

A. That was October 4th, according to your own records. I discussed plans with Mr. Denson at that time.

Q. Now coming down to the meeting which you said you had December 23rd in Visalia?

A. Yes,

Q. And you told us that you spent 21½ hours there, I think?

A. I spent 21½ hours there. [396]

Q. Did you arrange to meet him there especially for the purpose of discussing these plans with him, or was that on your way over?

A. I telephoned him that I was coming with the plans.

Q. Did you have any other business in that section of the country?

A. I was going down to Los Angeles. My home at that time was still in Los Angeles.

Q. You were on your way from where to where when you stopped in Visalia?

A. From Oakland to Los Angeles.

Q. So the Visalia visit wasn't especially arranged to see him, just simply a matter of your stopping off there, is that right or not?

(Testimony of T. P. Moorehead.)

A. Well, I thought it was important to see Mr. Denson in connection with the plans as far as we had gone.

Q. Up to that time you had not received any instructions from Mrs. Mapes or Charles W. Mapes to take up the matter of——

A. (Interrupting): I had no specific instructions from Mrs. Mapes or Charles to take up with Mr. Denson.

Q. Did you ever have any instructions subsequent to the Visalia meeting to submit plans, drawings and specifications to Mr. Denson for his approval?

A. I never had any specific instructions to submit plans, drawings or specifications to Mr. Denson?

Q. Insofar as you did submit any, that was done by reason of your knowledge that he had this agreement of September 24, 1945?

A. That is correct. It was natural for him to know what was going on.

Q. When next, after the December 23rd meeting at Visalia, did you meet with Mr. Denson in regard to the plans or drawings, or in regard to anything about the hotel building?

A. It was within a couple of weeks, in my own office, and Charles was there at that meeting and testimony has been it was on the 28th of December. I don't recall the exact date.

Q. Your mind is refreshed to some extent by what you have heard here as to dates, is that right?

A. That is right.

(Testimony of T. P. Moorehead.)

Q. Did Mr. Denson ever come up here and look things over in connection with the construction work in any way or show any interest in it?

A. I think Mr. Denson may have been up here once while we had the building under construction.

Q. Do you remember the occasion about when that occurred? A. I do not.

Q. What makes you think he was here?

A. I just seem to remember that he was here once. Whether he was or wasn't, I don't recall.

Q. What his visit amounted to, he didn't tell you? [398]

Q. Did he ever report to you why he was, or did you learn why he was here?

A. He probably did. I wouldn't say he did.

Q. You don't remember much about it at all?

A. No.

Q. It may be he wasn't here, as far as you are concerned?

A. As far as I am concerned, he may have been.

Q. You are not sure?

A. I can't be sure.

Q. Insofar as you have any remembrance about his being here, about when you would say his visit occurred?

A. I really couldn't say, Mr. Cooke, whether it was after April or whether it was before April. It was probably before. I recall a vague recollection that he was there.

(Testimony of T. P. Moorehead.)

Q. The next meeting you started to tell us about a while ago was December 28th, I think you said?

A. Yes.

Q. That was held where?

A. In my office.

Q. Who were present on that occasion?

A. Mr. Denson, Mr. Slocum, Charles and myself.

Q. What was the occasion of your getting together? What was the reason for the meeting?

A. To go over the plans as we had them developed at that time, which had incorporated some changes requested by Mrs. Mapes. [399]

Q. At whose suggestion was that meeting held?

A. My own. I wanted to get the plans finished as quickly as possible.

Q. How long a time was spent by the parties there together considering the plans and so on?

A. At least two hours, probably longer.

Q. What room did you say that was in?

A. In my office.

Q. In Oakland?

A. In Oakland, yes.

Q. And was the entire two hours consumed in discussion and consideration of the plans and drawings? A. Yes, sir.

Q. You had a number of drawings, I suppose, to submit to the persons present? A. Yes, sir.

Q. And you spread them out and they went over them?

A. One by one. There were various questions.

Q. Were there any suggestions made by Mr. Den-

(Testimony of T. P. Moorehead.)

son at that time in regard to any changes in the plans? A. Not at that time that I recall.

Q. Did anybody make any suggestions as to changes or what they wanted as changes?

A. None that I recall because a change had been requested a few days previous. [400]

Q. Who requested a change a few days previous?

A. At my meeting with Mr. Denson in Visalia he requested this change which I took up with Mrs. Mapes, as I already stated. She said, "Of course I want the rooms larger."

Q. That is when the matter of changing——

A. (Interrupting): The room sizes.

Q. ——these rooms would be made larger first came up, is that right? A. Yes.

Q. And from whom did you first learn from anybody that there was to be that sort of change? Was that from Mr. Denson or Mrs. Mapes?

A. That was Mr. Denson.

Q. And that was at this Visalia meeting?

A. That is right.

Q. And did you then communicate with Mrs. Mapes as to the suggestion of the change in the rooms? A. Yes.

Q. How did you communicate with her?

A. By telephone from Los Angeles.

Q. You went from Visalia to Los Angeles?

A. Yes.

Q. How soon after your arrival in Los Angeles did you communicate with Mrs. Mapes?

A. The next day. [401]

(Testimony of T. P. Moorehead.)

Q. I think on direct examination you stated something to the effect that she said that was what she wanted all along, or words to that effect, is that right?

A. That is correct.

Mr. Cooke: That is all.

Mr. Platt: May we have an order, your Honor, that witnesses subpoenaed shall be here on the 10th of December?

The Court: Yes; further proceedings in this case will be continued until December 10, 1946, at Reno, at 10:00 o'clock and all witnesses who have been subpoenaed and those here now in attendance will be required to be here at 10:00 o'clock Tuesday, December 10, 1946. [402]

Reno, Nevada, Tuesday, December 10, 1946

10:00 A.M.

Appearances same as at previous session.

Mr. Cooke: We have depositions on file with the clerk, taken according to stipulation. We request they be opened.

Mr. Platt: That is agreeable.

The Court: So ordered. The depositions may be opened, subject to examination of counsel. What is the state of the record?

Mr. Platt: If the Court please, Mr. Moorehead was under cross-examination by Mr. Cooke. I received a letter from Moorehead with a letter from his physician, saying that he was ill with ear trouble and yesterday he phoned me, stating he hoped he

would be excused. Of course, he is our witness. However, we have no objection to excusing him temporarily under the circumstances, with your Honor's consent, but he was under cross-examination by Mr. Cooke. If we can agree on that, I have no objection.

The Court: Mr. Cooke probably desires to cross-examine him further, or were you about through with him?

Mr. Cooke: Mr. Moorehead communicated with me also and I told him to take it up with Mr. Platte, he was the plaintiff's witness, and I suggested the proper way would be [403] to get an affidavit from his physician and forward to Mr. Platt. I don't know whether he did or not, but as I see it, we can probably proceed with some other witness and defer further cross-examination until later in the trial. Maybe he will be well enough to be here.

The Court: It might be well to inform Mr. Moorehead his presence will be required, in view of the statement of Mr. Cooke, so he won't put himself out of reach to be available here. He might think it wouldn't be required and might go away.

Mr. Platt: I would only be disposed, if your Honor please, to consent to temporary absence and to be on call of the Court and counsel when desired.

The Court: In order to avoid any long delay on his account, if Mr. Cooke will some time later inform the Court and counsel when he would like to have Mr. Moorehead here, we will try to get that information to Mr. Moorehead.

Mr. Cooke: Have you an affidavit from him?

Mr. Platt: No, no affidavit. I have a letter from his physician.

Mr. Cooke: I haven't any doubt from what I have heard he is rather seriously indisposed.

The Court: It might be well if counsel would communicate [404] with him. Are you ready to proceed?

Mr. Platt: Yes, your Honor. Call Mr. Slocum.

FRANCIS HARVEY SLOCUM

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. What is your full name?

A. Francis Harvey Slocum.

Q. Where do you reside?

A. Oakland, California.

Q. What is your profession or vocation?

A. Architect.

Q. How long have you been so engaged?

A. About thirty years.

Q. Are you acquainted with the parties to this action, namely, the plaintiff, Peter G. Denson, and the defendants, Mrs. Mapes and Charles and Gloria?

A. Yes, I am.

Q. How long have you known Mr. Denson?

A. Well, I have known him for approximately a year and a half.

(Testimony of Francis Harvey Slocum.)

Q. How long have you known the defendants?

A. Just a few months before that.

Q. How did you happen to meet the plaintiff, Mr. Denson, and become acquainted with him?

A. Well, I met him in a hotel meeting that we were having in San Francisco at the Fielding Hotel, I believe it was, when [405] Mrs. Mapes and the rest of the family and Mr. Moorehead were having a meeting and I was called in, too.

Q. Do you remember about when that meeting at the Fielding Hotel occurred?

A. Well, I would say it was in possibly April or May, along in there, of 1945.

Q. Well, it could have been several months later than that, couldn't it, some time in August, 1945?

A. Well, we had another meeting in August. We had two meetings, one at the Sir Francis Drake and one at the Fielding. The one at the Fielding was before that. I believe the one at the Sir Francis Drake was on V-J or V-E day, I don't remember which.

Q. Are you associated with Mr. Moorehead in any capacity?

A. Yes, I am.

Q. In what capacity?

A. Well, I do all the architectural work and any designing, lay-out work of that time. I have been architect for the firm.

Q. For how long a period of time have you been so engaged with Mr. Moorehead?

A. Well, we were engaged about 1930 in prospective work. We didn't do any work then because

(Testimony of Francis Harvey Slocum.)

the depression set in and nothing was done. I have known Mr. Moore about 20 years off and on but we did not become associated together until [406] about 1944, the middle of 1944.

Q. Did you perform any services as an architect for Mr. Moorehead with reference to the construction of the so-called Mapes hotel in Reno, Nevada?

A. Yes, I did.

Q. When did you begin your services in that way?

A. Well, we made preliminary sketches in 1945. Well, it was in the first part of 1945, I would say, we started preliminary sketch drawings on the hotel. It might have been the latter part of '44, but around the first of the year anyway.

Q. Prior to the meeting at the Fielding Hotel in San Francisco, which you state you think was some time in April, 1945, had you ever met Mr. Denson prior to that time, Peter G. Denson?

A. No, never met him before.

Q. The first time you met him was on that particular occasion? A. That's right.

Q. And what was said and done at that meeting at the Fielding Hotel?

A. Well, I made some sketch plans and pictures and elevations and views of the hotel and sent them to Mrs. Mapes and Mr. Denson was there and we were going over the plans with them and that was my purpose in being there, to explain what I had done and why I had done it.

(Testimony of Francis Harvey Slocum.)

Q. Was Mr. Denson present at the entire interview or conference? [407]

A. Yes, he was there.

Q. Did he examine the plans presented by you along with Mrs. Mapes and Charles Mapes?

A. Yes.

Mr. Cooke: If the Court please, we desire to interpose an objection to this testimony and all this type of testimony on the grounds previously stated in similar objections to similar questions. Specifically upon the ground it is irrelevant and immaterial, that it purports to change or vary or supplement the terms of a written document; that there is no evidence or any plea of any oral agreement involved in this case to which there could be any part performance; that admission of the testimony is precluded by the provisions of the Nevada statute; that this occurred prior to the making of the September 24, 1945, agreement, I gather from the question, and whatever was done and whatever was said is merged in the written agreement that is relied upon as a basis if this action by plaintiff and all the previous transactions and talk and verbal arrangements are deemed merged in that, and therefore it is immaterial.

The Court: I am inclined to agree with the principles of law that you stated in your objection, but I can see that the Court is entitled to know what took place between these parties in [408] preparing

(Testimony of Francis Harvey Slocum.)
to make this contract, so the objection will be over-
rule. You may have an exception.

(Question read.)

A. Yes.

The Court: If that answer was before your objection, the Court's ruling will be deemed withdrawn and it may be deemed made at the proper time and considered at the proper time.

Q. Do you recall whether at that time any one of the parties present made any suggestions as to modification of any of the plans you submitted?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. Mrs. Mapes—I was trying to sell them the idea of a drive-in-turn-around type of hotel and it causes a lot of differences in levels and Mrs. Mapes did not care for it and she did not want steps and Mr. Denson agreed also as she stated and there was a lot of discussion there and I started then to make some new sketches, eliminating the steps.

Q. Do you recall whether Mrs. Mapes asked Mr. Denson's opinion as to such a matter as you have just testified to?

Mr. Cooke: Same objection. Also leading.

The Court: It might be leading.

Mr. Platt: I think probably it is, your Honor.

Q. Were any suggestions made by Mr. Denson with respect to a modification of the plans submitted?

A. He agreed to try to get the steps out, too.

(Testimony of Francis Harvey Slocum.)

Q. Were there any other suggestions made at that time? A. Not at that time, no.

Q. How extensive were the plans you submitted then? Did they involve the entire structure?

Mr. Cooke: Same objection to all this.

The Court: So considered and same ruling.

(Question read.)

A. Yes, it did involve the entire structure and we also had introductory sketches showing how this plan would appear and also the drive-in, etc. These were all in colors, so we could show it up.

Q. Do you remember how long the conference took?

A. Well, it took—we came over there, it was on Sunday, at 10:00 o'clock I believe, and lasted all morning and we went to lunch and a couple of hours after that. Three hours maybe.

Q. And without going too much into detail, do you recall generally what was said by each one of the parties present, you, Charles W. Mapes, Mrs. Mapes, Mr. Denson, Mr. Moorehead?

A. Well, there were a lot of pros and cons. Some were for the drive-in with different levels and Mrs. Mapes was definitely against that. She did not want walking up and down stairs, thought they would fall, so finally they all agreed that that [410] would not be in and I took the sketches and withdrew and started some new sketches.

Q. Then, as I understand it, according to your recollection, the entire discussion during the morning and afternoon involved just one step?

(Testimony of Francis Harvey Slocum.)

A. Yes, that was the whole scheme here. The plans of the upper floors wasn't discussed much at that time, because it depended on what we did on the first floor and basement, so we had to determine what to do there that changed everything.

Q. Do you remember anything that Mr. Denson, the plaintiff here, said during that discussion?

A. No, I don't at that time, except that he did finally agree with Mrs. Mapes that we should eliminate the steps and to have the thing level as much as we could, so that was the outcome of the whole thing and we had to do it all over again.

Q. Then when, if at all, did you meet again, at which meeting Mr. P. G. Denson, the plaintiff, and Mr. Moorehead, yourself and Mrs. Mapes or Charles W. Mapes were present?

A. Well, the next meeting was at the Sir Francis Drake Hotel.

Q. Do you remember about when that occurred?

A. That was either V-E or V-J Day. It was one of the two, I don't remember which.

Q. Somewhere around the middle of August?

A. Yes, V-J Day, the 14th of August; but I don't think it was [411] then because I was standing in the City Hall in Oakland when the sirens blew. It must have been V-E Day. Either that or I went there later. We went there in the afternoon in this case, but I remember the whistles blew when I was at the City Hall in Oakland, trying to get a permit for another building, so I couldn't have been over there.

(Testimony of Francis Harvey Slocum.)

Q. Who were present at that meeting?

A. Mrs. Mapes, Charles and Gloria Mapes was there for a while, Mr. Moorehead and myself.

Q. Was Mr. Denson present?

A. Oh, yes, Mr. Denson was present.

Q. Where in the Sir Francis Drake Hotel did that interview take place?

A. Upon the mezzanine floor, a little bit above the main lobby floor, really the second floor.

Q. What time of day did that conference occur?

A. That probably took up about one o'clock because it was after lunch it started.

Q. For how long a time did it continue?

A. It lasted, I believe, until about four o'clock; the middle of the afternoon some time or late in the afternoon.

Q. What was done at that conference?

Mr. Cooke: Perhaps we should have the same objection as to this made.

The Court: It may so appear and same ruling.

Q. What was done and what was said, as nearly as you recall, at that conference?

A. Well, at that meeting there I had the casino, as we call it, shown in the center of the building instead of on the river side, and Mrs. Mapes wanted it definitely on the river side of the building, so that changed the first floor plan of that a little bit more and after discussing it for this length of time, I went home that night and in the office I made a quick sketch of the entire scheme, changed the casino on the river side and that is approximately

(Testimony of Francis Harvey Slocum.)

the way the plan is now, and I didn't go to the meeting next day but Mr. Moorehead took this over to them and showed them some other buildings around town, but he took sketches over there, but I didn't go there next day. The sketches I made that night were the ones that were accepted more or less later.

Q. What, if you recall, did Mr. P. G. Denson say at that meeting?

A. Well, he agreed finally, too, he was satisfied with a——

Mr. Cooke: May I interrupt—the question was what was said, not what was agreed to.

Mr. Platt: Yes, that was the question.

A. Well, I don't know just what he did say, but he said, "All right, let's put it on the side."

Q. Is it fair to say that he made a statement in accord with Mrs. Mapes' suggestion? [413]

A. Yes; that is what finally happened anyway.

Q. Was anything else discussed at that particular meeting with respect to the hotel?

A. Well, of course, there was the size of the rooms and apartments and things like that and Mrs. Mapes wanted to see some apartments so they decided to go and see some. I didn't go with them. I sent these sketches over with Mr. Moorehead and they went around to look at apartments.

Q. Did Mr. Denson make any suggestions at that interview with respect to the size of the rooms which you have just mentioned?

A. No, not at that time, no.

(Testimony of Francis Harvey Slocum.)

Q. Did he make any other suggestions that you recall?

A. I don't recall of any suggestions there. It was more or less getting the general scheme decided on.

Q. Did Mr. Denson participate generally in the conversation?

A. Oh, yes, he was there, participated. What he said I really don't know now except they all agreed on this other plan. That is what I was interested in. They finally did agree on the river side and accepted the sketches I made that night.

Q. You mentioned, in answer to one of my questions, that Mrs. Mapes went around looking at apartment hotels?

A. Yes.

Q. Were you present?

A. No, I wasn't present. They went the next day. I didn't [414] go with them.

Q. You were not present?

A. No, I don't know where they went. They were going to certain ones but I don't know whether they went or not where they were to go.

Q. Do you recall having another meeting at which Mr. Denson, Mrs. Mapes or Charles and/or yourself and Mr. Moorehead were present?

A. Yes, we had another meeting in our office in Oakland in January, I believe, after the first of the year at least.

Q. You mean January, 1946?

A. '46 that would be, yes, and Mr. Moorehead, myself and Mr. Denson and Charles were present.

Q. Was there any one else there?

(Testimony of Francis Harvey Slocum.)

A. No, some of the boys in the office might have been there. I don't remember anybody else there at that time.

Q. What was the general discussion?

A. Well, the general discussion——

Mr. Cooke (Interrupting): Just a moment. Same objection.

The Court: Same objection and same ruling.

A. Well, we had these sketches supposed to be in final shape at that time, ready to start working drawings. In fact, we had started the foundation of the building at that time, had the engineering all done, which didn't affect the plan materially, [415] so that at that time they decided to enlarge some of the rooms, omit a room and decided to make less rooms so the remaining rooms would be larger.

Q. When was that decided?

A. That was in January.

Q. To omit some of the rooms and make the rooms generally larger, when was that decided?

A. That was at this January meeting.

Q. Who made that suggestion?

A. That was Mr. Denson and Mr. Moorehead discussed that and Mr. Mapes also.

Q. Do you remember what Mr. Denson said?

A. Well, they asked Mr. Denson if he was satisfied with making larger rooms. He said certainly, he wanted larger rooms.

Q. Is it a fact or isn't it that Mr. Denson himself made the suggestion as to cutting out some of the rooms so you could have larger rooms?

(Testimony of Francis Harvey Slocum.)

A. Well, I believe it was his suggestion to have larger rooms, that was the way to get it.

Q. Do you remember when he made that suggestion?

A. That was during this meeting some time.

Q. Do you recall at that interview whether he made any other suggestion?

A. I do not believe so at that meeting. That was the only suggestion I remember at that meeting.

Q. Was there anything said by him about the sky room at that meeting?

A. The sky room didn't come up at that meeting. We were just trying to get the general plan worked out. Hadn't decided much on the sky room. Had the general space there but nothing decided much on it.

Q. Was anything at all said about the sky room by anybody at that meeting in January?

A. Really I don't believe the sky room was shown in the plans and it has been that way ever since the first sketch except at one time later they decided to enlarge it, but not at that particular time.

Q. Was any other suggestion made by anybody at that meeting as to modification or change of the plans which you submitted?

A. No, not outside of this room enlargement on the regular floors.

Q. How long did this meeting take place?

A. A couple of hours. They were there a couple of hours in the morning, then went out to lunch and

(Testimony of Francis Harvey Slocum.)

then went over to the city. I would say a couple of hours.

Q. Do you recall any further meeting at which you and Mr. Denson and either one of the Mapes were present, and Mr. Moorehead?

A. Yes, we had a meeting there—well, Mr. Moorehead had some meetings I wouldn't know of except this meeting in April, I [417] think it was, when Miss Mason came up with some sketches for furnishings of the place.

Q. That was in April, 1946? A. Yes.

Q. Do you remember what date in April that was, or about what date?

A. No, I don't know the exact date; I wouldn't be sure.

Q. Who were present at that meeting?

A. Well, Mr. Moorehead, Mr. Denson, Mr. Mapes, Miss Mason and myself.

Q. Where did it occur?

A. That occurred in our office.

Q. When did it begin and when did it finish?

A. Well, it began—Miss Mason came in with Mr. Denson, came about 10 o'clock and then Mr. Mapes came a little later. They came in around 10 o'clock and Miss Mason had a lot of drawings to show us and we looked those over and discussed them.

Q. At that time did you, or Mr. Moorehead in your presence, submit the floor plans or the general plans of the hotel?

(Testimony of Francis Harvey Slocum.)

Mr. Cooke: Let the record show my same objection interposed.

The Court: The record may show objection and same ruling.

A. Oh yes. [418]

Q. I mean were the plans of the hotel as you had them exhibited to the parties present?

A. Oh yes, they were there.

Q. Were they discussed? A. Yes sir.

Q. Did Mr. Denson participate in the discussion? A. Yes sir.

Q. Did Charles Mapes participate?

A. Yes.

Q. And did you and Mr. Moorehead and Miss Mason participate? A. Yes, we did.

Q. Do you recall generally what was discussed?

A. Well, Miss Mason brought up pictures of the plans suggesting arrangements of the coffee shop and the sky room and the kitchen lay-outs and two or three typical rooms. The coffee shop lay-out and the kitchen lay-out were not right. Of course, she didn't know I was going to design all that, so she withdrew that right away because she didn't want to interfere with my designing, so she withdrew them and then the sky room part, they had that laid out. She wanted to make changes and change from one side to another and I already had a scheme worked out with the grandstand where I originally had it. Of course, they had a few other changes that interfered with my plans that they didn't know anything about, wasn't their fault.

(Testimony of Francis Harvey Slocum.)

They wouldn't fit in with our other things so we couldn't use them very well.

Q. When Miss Mason submitted plans for equipment and furniture, that is what you mean?

A. Yes.

Q. Equipment and furnishings and accessories and all that. Did she have in her possession any plans that you and Mr. Moorhead had of the hotel itself?

A. Yes.

Q. Do you know how she came into possession of those plans?

A. Yes.

Q. How?

A. Mr. Denson took them to her.

Q. Did you see Mr. Denson take them to her?

A. No, but they brought them back and said that is where she got them.

Q. They were all exhibited there at the meeting there in Mr. Moorhead's office?

A. Yes.

Q. Was there anything said about change in the sky room at that meeting?

A. Yes, I would say she wanted to change the bandstand around.

Mr. Cooke: She?

A. Miss Mason. She was the decorator there or designer from Barker Bros. and they wanted to have the bandstand changed on the side instead of the end of the room and we didn't like [420] that. It would interfere with service from the kitchen. We didn't make that change.

(Testimony of Francis Harvey Slocum.)

Q. As I understand, the original plans for the sky room had been modified and changed by you?

A. Yes, we had enlarged that, enlarged the sky room. They had the sky room much smaller and we pushed it out and made it larger.

Q. Were you present at any discussion about the contour or size of the sky room at which Mr. Denson, Charles or Mrs. Mapes were likewise present?

A. No, I wasn't. Mr. Moorehead had been up here to Reno and he said they wanted the sky room larger. Where he got the information, I do not know, but we made it larger.

Q. At any rate, you made the change?

A. Yes.

Q. And information you had concerning it was given to you by Mr. Moorehead?

A. Yes, I wasn't at any meetings that they had.

Q. Did you have any further discussion than those you have narrated, at which Mr. Denson or Mrs. Mapes or Charles were present?

A. No, that was the last one that Mr. Denson was present. That is the last meeting I remember he was there.

Q. And you think that was sometime early in April, 1946?

A. I believe so. I wouldn't be sure. It was at the time [421] Miss Mason came up there. I believe that is the date it was.

(Testimony of Francis Harvey Slocum.)

Mr. Platt: I think you may cross-examine.

Cross-Examination

By Mr. Cooke:

Q. I believe you told us that there were no conferences at which any of these parties, Mrs. Mapes, Charles or Mr. Denson or yourself were present after this time when Miss Mason was up?

A. No, nothing where all were present.

Q. Did you attend any conference where not all but some were present? A. After that?

Q. Yes.

A. Yes, I had a conference with Mrs. Mapes and Charles and Mr. Moorehead after that.

Q. Mr. Denson wasn't there? A. No.

Q. Those conferences took place in the city or here?

A. Some here. Mrs. Mapes was down there twice or three times. Charles has been down there.

Q. From whom did you get instructions finally for the work you were to do?

A. From Mr. Moorehead. Of course all instructions would come from him because he has the contract to do it and I have a contract with him. But I was always in the meetings to give my ideas on it from the design standpoint.

Q. But when it came to a question of your doing or not doing [422] your work in a certain way, you accepted instructions from Mr. Moorehead?

A. Yes, final instructions had to come from him because I had no authority to do it otherwise.

(Testimony of Francis Harvey Slocum.)

Q. You didn't, for instance, do any work there pursuant to some instructions that Mrs. Mapes had given you? She didn't give any instructions to you how to do your work?

A. No, not unless I discussed with Mr. Moorehead first and he would say it was all right.

Q. And the same would be true in regard to Mr. Denson, wouldn't it? A. Yes, it would.

Q. This sky room and the change in the sky room, that contemplated an enlargement of it, did it not? A. Yes.

Q. What was the size of it originally before the change was brought about?

A. Well, it was approximately, I would say, 80 feet long and now it is the full length of the building. It is about 150 feet long.

Q. Do you remember at whose instigation or suggestion or insistence this matter first came up about lengthening the sky room?

A. No, I really do not. Mr. Moorehead was the one that told me about it, that they had decided now to change it. Who decided, [423] I don't know. He was up here at a meeting and he said they decided to make that larger.

Q. Did you learn anything from him as to who were at this meeting up here that you mention?

A. No, I really didn't ask him that. I don't know who was at the meeting.

Q. The first notice or knowledge you had of any enlargement of the sky room was as you said from Mr. Moorehead? A. Yes, that is right.

(Testimony of Francis Harvey Slocum.)

Q. Was the matter of enlargement of the sky room discussed at any of these meetings after that?

A. After Mr. Moorehead told me about it?

Q. Yes.

A. Well, yes, every time we came up we made some slight change in it, trying to get more glass in, etc., and made another change about the opening up the thing and we had the bandstand closed in and some dressing rooms, so you couldn't see out the north end. We put those on the floor below so we could get more view.

Q. When, as nearly as you can state, Mr. Slocum, was this communication to you by Mr. Moorehead about this meeting up here in Reno and it was decided about enlargement on the sky room?

A. I would say about maybe June or July.

Q. What year? [424] A. 1946, this year.

Q. Did you ever discuss the matter of enlargement of the sky room with Mrs. Mapes directly?

A. I don't know that I have. I talked to her about it after we enlarged it but I don't know as I discussed it before we enlarged it.

Q. Did she express satisfaction with the enlargement?

A. Yes, I made sketches showing the enlargement.

Mr. Platt: I do not desire to limit the cross-examination but conversation between Mr. Slocum and Mrs. Mapes will be self-serving if Mr. Denson was not present.

(Testimony of Francis Harvey Slocum.)

The Court: What is the purpose of this, Mr. Cooke?

Mr. Cooke: I don't know as I have any special purpose by it. I will withdraw the question.

Q. You said something about the rooms, being a change in the original plans as to the size of the rooms. Do you remember that?

A. Yes, the floor plan, that is the typical floor plans.

Q. You remember your testimony in regard to that? A. Yes.

Q. When did the matter of enlarging the rooms first come up, Mr. Slocum?

A. As I remember, it came up in this meeting we had in January.

Q. January, 1946? [425] A. Yes, '46.

Q. That is the first you heard of it are we to understand?

A. That is the first we heard it. They discussed it at that meeting. Decided to take out a room so that we would have larger rooms.

Q. Do you know who first suggested at this meeting that the rooms be made larger?

A. No, I couldn't say who first suggested it.

Q. Were you there during the entire meeting?

A. I was in and out. I was in there most of the time, but I would be in and out, phone call or something.

Q. Did that meeting take place in our office?

A. In our office, yes.

Q. In your direct examination I think you stated

(Testimony of Francis Harvey Slocum.)

that Mr. Moorehead, as far as you heard the talk, suggested the larger rooms, am I correct in that?

A. Well, I would not be sure whether he did or not.

Q. Well, in any event, the matter of enlarging the rooms was agreed to by all those present as a proper and practical step of the arrangements?

A. Yes, they agreed to make them larger.

Q. Did Mrs. Mapes say anything on the subject at that time?

A. No, she wasn't at that meeting.

Q. Did Charles Mapes say anything about it?

A. Yes, he agreed to it. [426]

Q. What did he say, Mr. Slocum?

A. He said, "Yes, let's have the larger rooms."

Q. How much difference in size was involved?

A. Well, probably about a couple of feet to each room.

Q. And that necessitated the killing, so to speak, of one or more rooms from the original plans?

A. One room from each floor on the particular side.

Q. Now at the previous meeting, that is on V-J Day, I believe you said along about August 14, 1945, the matter of the casino change was discussed, is that right?

A. Yes.

Q. And Mrs. Mapes was present at that meeting?

A. Yes, she was.

Q. And Mr. Denson and Charles and Gloria and you?

A. Yes.

Q. You had the casino, I believe, located some-

(Testimony of Francis Harvey Slocum.)

where in the middle of the building and at somebody's instigation or suggestion it was changed to the river side? A. That is right.

Q. Who suggested that?

A. I think Mrs. Mapes always wanted it on the river side and we were trying to bring in a store building and bring in more income, but she didn't want it that way.

Q. Was that at this meeting?

A. She always wanted that. [427]

Q. At that meeting it was changed, so far as the plans were concerned? A. Yes.

Q. To have it on the river side, is that right?

A. Yes. They decided to do that when I made these sketches at night.

Q. Was the matter of having larger rooms discussed at that same meeting or not?

A. No, I don't think the rooms came up at all at that meeting.

The Court: Was that casino changed?

A. To the river side or Virginia Street side, not to the river side, right on the corner of Virginia and the river.

Q. From the corner easterly to the easterly limits of the building?

A. Yes. Well, it was in the center of the building facing Virginia Street, right in the center of the building, with entrance on Virginia. Now they have moved it over to the corner of Virginia Street and the river.

Q. You don't remember that the matter of any

(Testimony of Francis Harvey Slocum.)

one suggesting larger rooms was made at the August 14th meeting, is that right?

A. No, I don't remember anything about that.

Q. Now the next previous meeting was in the Fielding Hotel, I think you said, is that right? [428]

A. Yes.

Q. And the only subject that was discussed at that time was what?

A. The main subject there was the different foot levels. We had a drive-in on the ground level which raised the main floor lounge up a half story and caused a lot of steps in order to get up, so Mrs. Mapes didn't want that, so we finally changed it.

Q. Was she the only one that made any objection to that arrangement?

A. She made the most objection and the rest all agreed.

Q. She was rather positive about it?

A. Yes.

Q. She brought it up first?

A. Yes, she jumped on me every time she saw me.

Q. Argued the question with you?

A. Yes, I was the one trying to sell the idea. I didn't get away with it.

Q. Mr. Slocum, under your employment in connection with this building, just what were you employed to do? What was the scope and extent of your job, so to speak?

A. Well, I was employed to do the designing and the general lay-out work and to make the build-

(Testimony of Francis Harvey Slocum.)

ing look nice, the interior and exterior, and do all of the architectural work necessary on it. [429]

Q. Well did that, for instance, embrace substantially the same thing as what was exhibited by Miss Mason, drawings and designs, etc.?

A. Well, she was going to redesign some of these rooms and she had some interior sketches, etc., of them, but the plans at that time were in such a shape that you couldn't tell what was going to happen. The outside, some engineering and main floor beams and columns weren't fully decided on, so she brought a lot of things that wouldn't work in so we couldn't use what she had for the coffee shop and kitchen also.

Q. Who had the designing of that, whether her plans fitted in or not?

A. I told her I was going to design the coffee shop.

Q. Were the plans and designs, etc., she had, were they used to any extent at all in the final work?

A. No, they were of no value.

Q. No value whatever?

A. No. She didn't know what we were going to do with the building and didn't know what engineering we were going to do in any of these rooms, so these designs wouldn't work and she didn't know what they were because they were shown on a different plan. They weren't on that plan.

Q. Did you either then or later have plans designed and adopted that were used insofar as the building being completed?

A. Oh yes. [430]

(Testimony of Francis Harvey Slocum.)

Q. With regard to the date September 24, 1945, how far advanced was your work in respect to having plans or specifications for the building?

A. Well, we had completed sketches at that time, as I remember. We started on sketches as soon as we had this other meeting in August and we completed the sketches then. There were two or three changes in the lay-out because we had to change the upper floor on account of the change in the lower floor.

Q. You use the term "sketches," does that mean in your profession temporary designs?

A. Well, there were preliminary drawings and we finished them up to a point where, if they are decided on, we make the mechanical drawings according to them. It shows the arrangement of all columns and beams. The engineering at that time wasn't figured. We didn't know exactly the size of the columns. We had the general lay-out all worked out then; the lay-out of plans according to these engineering columns, etc., were to do. We had all those done.

Q. How about specifications?

A. Well, we didn't have anything of that kind at that time.

Q. How soon after September 24, 1945, did you have any specifications?

A. Well, we had the engineering done around the first of the year and the specifications for that part. We didn't have the [431] specifications for that part because they——

(Testimony of Francis Harvey Slocum.)

Q. (Interrupting) You say "for that part," what do you mean?

A. The engineering part is the structural part, pillars and columns and beams, etc. That is a separate job from design of the building. We had to design the building around this structure, but the structure of the beams and columns, we had to design our floor plans so these beams and columns wouldn't be in the way. You can't move them. Now we had the engineering done around the first of the year and the sketches were drawn and we knew it would work there so we could start the foundation. Then we kept adding to the plans, started the working drawings, of course, before that but kept building them as they were completed so we could order materials for that part of it.

Q. You did have some plans, designs and specifications in January?

A. Yes, we had the plans all drawn on regular scale in January.

Q. What time in January?

A. Well, there were the regular plans, specifications and scale about the middle of January they were ready.

Mr. Platt: You mean 1946?

A. Yes.

Q. Did you furnish copy of the plans and specifications, so far as you had these worked out at this time, to anybody? [432]

(Testimony of Francis Harvey Slocum.)

A. Yes, copy of prints of everything as we went along.

Q. Blueprints?

A. Yes. The job was started at this time, commenced up here.

Q. Did Mr. Denson get a copy of them, do you know? A. I believe he did, yes.

Q. Why do you believe?

A. Well, I don't know. I didn't give him one but he is supposed to have a copy. I don't know whether he got one, but he saw the plans. Whether he got a copy, I don't know.

Q. How soon after this time in January did he see them?

A. He saw them at this January meeting that we had the plans, the engineering, was all completed at that time and plans were being drawn for the other. In fact, we had the plans all drawn and then changed this room.

Q. Do you know whether Mrs. Mapes or Charles got a copy of the plans and specifications you had at that time? A. Oh yes, they had them.

Q. Did you see them have them?

A. No, I didn't see them. I saw them at the house one day and I seen them at the office, of course, too.

Q. Mr. Denson and Mrs. Mapes both were supposed to have the plans at that time, supposed to have a copy of the plans, whatever you had?

A. Yes sir, every one was given a set of prints.

Q. The plans and architectural work that you

(Testimony of Francis Harvey Slocum.)

did prior to [433] September 24, 1945, was based upon a planned building costing approximately 800 thousand dollars, is that right?

A. Yes, I believe so. The first was around 6 or 7 hundred thousand and then it was enlarged to about 8 or 9 hundred thousand.

Q. Did you draw any plans or specifications or any architectural drawings of any kind for the 700 thousand dollar plan?

A. Yes, these were all in sketch form, preliminary drawings. It was just preliminary drawings, you might say, because we didn't have any contract at that time either.

Q. But you were doing some of that work based upon the contemplated cost of 700 thousand dollars?

A. Yes sir.

Q. And then some time prior to September 24, 1945, it was increased to 800 thousand, is that right?

A. Yes.

Q. And after that time it was increased again, or not?

A. Yes, it was increased several times after that.

Q. That would necessitate change in your plans and specifications?

A. Yes, it did.

Q. When was the first change made with respect to the proposed cost of the building?

A. Well, the first change—the first sketch I made was for around 675 thousand, as I understand it, and sketch was made [434] in '44. That was the first sketch I made, and then in 1945 that was revised because they had added to the building and

(Testimony of Francis Harvey Slocum.)

we made this first floor change, which made a change in the set-up and I had a tower effect worked out in the first one and Mrs. Mapes wanted the building to run right along evenly instead of set back, so that made a change and also made a change in the cost because it covered more ground, so that ran the cost up another hundred or two hundred thousand.

Q. What was the total figure at that time?

A. Well, the figure at that time the second general change made, was around 850 to 900 thousand.

Q. When was that with reference to September 24, 1945, before or after?

A. That was after that.

Q. Then after September 24, 1945, when was the next change with regard to the cost of the proposed building, size, etc.?

A. Well, it was about in June, I would say, of this year, or July, that they added two more stories. There was one before that, of course, where we added to the sky room. That made about 50 or 75 thousand difference there and in June or July they added two more stories to the building, which made a big difference.

Q. From 10 to 12 stories? A. Yes.

Q. That jumped the cost up how much? [435]

A. Well, jumped the cost 300 or 400 thousand, I would say.

Q. From 875 thousand or whatever it was before that? A. Yes sir.

Q. Do you know anything about the construction

(Testimony of Francis Harvey Slocum.)

work that was done here to get an additional 12 feet?

A. Yes, several of these sketches, the first sketches we made, were made for 12 feet additional. They made sketches adding 12 feet to the width of the building and that 12 feet wasn't obtained, so we changed it back to the present width.

Q. In September of 1945, had you, either yourself or through Mr. Moorehead, delivered any prints or copies of prints and specifications and designs of the building to Mr. Denson?

A. Mr. Moorehead had sent some down to him and I believe he took some down.

Q. Is the same true with regard to Mrs. Mapes, she was furnished with them too?

A. Oh yes, she was furnished with them too.

Q. Do you know what those specifications or plans consisted of?

A. They were preliminary plans of these different schemes we had made for the building.

Q. That contemplated a building not to cost more than 800 to 875 thousand?

A. Most of them were made on that basis. We made the first one around 675 thousand and then the next batch from there on [436] were on the larger amount, figuring on 10 stories, which were around 900 thousand.

Q. Do you have any specifications at this time, copies of which were exhibited to anybody?

A. No.

(Testimony of Francis Harvey Slocum.)

Q. You have had specifications since that time, have you not? A. Oh yes.

Q. Have you delivered copies of those to anybody?

A. Yes, they all have copies, Mrs. Mapes—I don't know whether anybody else—the contractor, etc.

Q. Do you know whether Mr. Denson has any or not? A. He may have, I don't know.

Q. But you know the Mapes family got them?

A. Yes, I know they had them.

Q. When did they get them in regard to the time they were prepared, shortly afterward?

A. Yes, as soon as they were prepared we mailed them up or took them up, Mr. Moorehead did.

Q. Is my understanding correct that those specifications were available some time earlier than January, 1946?

A. Yes, part of them were. We drew them in sections. The engineering was done first and then follows the other types of engineering, like heating and plumbing and we make separate specifications and then we make specifications as we design the rest of the building. The specifications are made with the designs.

Q. After this meeting in January, 1946, further specifications were prepared and copies furnished, is that right? A. Yes.

Q. And were they furnished to Mr. Denson?

A. Well, you mean after the April meeting?

Q. No, I mean after the January meeting.

A. They may have been, I don't know.

(Testimony of Francis Harvey Slocum.)

Q. Do you know whether they were furnished the Mapes family?

A. Yes, I know they have them.

Q. Do you know whether they were furnished shortly after they were prepared?

A. Yes, they were.

Q. You are now stating specifications after the January meeting. You state you prepared them from time to time?

A. After the January meeting?

Q. Yes.

A. We prepared specifications as we designed different parts of the building.

Q. How many different batches of specifications did you prepare and deliver copies to the Mapes family?

A. Well, probably 30 or 40.

Q. Well, from time to time as the work progressed?

A. As the work progressed, yes.

Q. Does it continue to occur now? [438]

A. Yes.

Q. As changes are made now are additional specifications made?

A. Yes, just this last week.

The Court: It might be well to take our recess at this time.

(Recess taken at 11:50 a.m.)

Afternoon Session, December 10, 1946, 2 p.m.

All attorneys present.

Mr. Slocum resumed the stand on further cross-examination by Mr. Cooke.

(Testimony of Francis Harvey Slocum.)

Q. Mr. Slocum, tell us as nearly as you can, the first time you discussed with Mr. Denson the matter of the construction of the building to be commenced?

A. Well, I don't know as I discussed anything with him about the building to be commenced.

Q. When did actual construction of the building commence?

A. Well, actual construction of the building began in January. We took the old building down in December and started the excavation and also changed the irrigation ditch on the outside before that.

Q. When did you commence the work of excavating or tearing down the old building? [439]

A. Work tearing down the old building was started in December some time.

Q. Do you remember what time?

Mr. Platt: Just a moment, may I interrupt. Do you know that of your own knowledge or what somebody else told you?

A. I was here when they were tearing down the old building and just started it and I was here about December 18th or 19th. They had started.

(Previous question read.)

A. About the middle of December, yes.

Q. 1945? A. Yes.

Q. Did you have any conversation with Mr. Denson in regard to this construction or demolition after that?

A. No, I have not talked to Mr. Denson since

(Testimony of Francis Harvey Slocum.)

the meeting we had in January some time.

Q. Was the matter of the status of the construction work and its progress or its commencement discussed at that meeting?

A. I don't believe so, no. Not with me, at least; I don't remember.

Q. Whether it was with you or you heard it discussed between the others?

A. No, I don't remember.

Q. It didn't come up while you were there?

A. No. [440]

Mr. Cooke: I think that is all.

Redirect Examination

By Mr. Platt:

Q. I understood you to state, Mr. Slocum, that you were present at a conference or a meeting in Mr. Moorehead's office in Oakland on or about April 1st?

A. Yes, sir.

Q. 1946?

A. Yes, sir.

Q. At which Charles Mapes and you and Mr. Moorehead and Miss Mason and Mr. Denson were present?

A. Yes, sir.

Q. Did you hear Charles Mapes make any statement with respect to not wanting to do any more with the sky room, that there was something he wanted to take up later?

A. No, I didn't hear him discussing that at all.

Q. You didn't hear him make that statement?

A. No, I didn't.

(Testimony of Francis Harvey Slocum.)

Q. I understood you to state also that about January 15, 1945, you, or Mr. Moorehead in your presence, furnished Mr. Denson with a copy of the then plans? A. Yes.

Q. And as I took down a note of your testimony you stated that Mr. Denson was supposed to have a copy of the plans? A. Yes. [441]

Q. Do you know why he was supposed to have a copy?

A. Well, he was given copies of all the sketches there as he was interested in the place. I didn't know just how at that time, but Mr. Moorehead always sent him a set of sketches when they were made.

Q. Would you state that was an invariable practice?

A. Yes, he always either took it down or mailed it down.

Q. Do you know when that practice was suspended, when you didn't give Mr. Denson any more plans?

A. Well, after this April 1st meeting that we had I don't believe we sent any more down to him. I am not sure because Mr. Moorehead handled that. I didn't send any down myself.

Q. Did Mr. Moorehead instruct you not to send any more after April 1st?

A. Yes, he told me then that Mr. Denson wasn't in the picture any more and that was the case, although I had nothing to do with it directly myself; he had told me that.

(Testimony of Francis Harvey Slocum.)

Q. You gave some testimony on cross-examination as to the probable expense of construction of the hotel building, in which you set a figure of two or three hundred thousand dollars for the two upper stories. Did I understand you right?

A. It first started out with 675 thousand and then went up to 8 or 9 hundred thousand and then it went up 250 thousand, along in there, so with the addition of that and other things that went into it, it would all come to that. [442]

Q. As an architect, skilled in the matter of building construction, it is a fact, isn't it, that the two lower stories of a hotel structure like the building here, are really the most expensive parts of the operation?

A. Well, the columns, etc., are in there but in a hotel they are not necessarily the most expensive because there is not nearly as much plumbing as on the other floors.

Q. But the construction cost, so-called, eliminating fixtures and plumbing, etc., are these higher on the first two stories?

A. Well, it depends on the height of the ceiling. In this case, where you have a large area, of course, the construction cost is lower than with a small area, like when you put in partitions, it costs more than a large open space. Of course, we have decorations which more or less offset that, so it may or may not. I don't know just exactly what are the costs right at the moment, whether that is higher or lower than the upper part.

(Testimony of Francis Harvey Slocum.)

Q. As a matter of fact, when you get above the first two stories, for instance, frame work and carpenter work, as you go up you can use that same material, the same structure in forming the forms of the foundation for your concrete and brick?

A. Yes, if you have a duplicate of the floor, of course, you can, and as you go up beyond the first two stories that would be a little more.

Q. But as you go up the cost is less for that reason? [443]

A. In certain cases it is if you have planned on it in the first place. Sometimes the cost is more if you haven't planned on it.

Q. As a matter of fact, take the hotel in which we are interested now, from the second to at least the tenth story the structural cost for each story between the 2nd and tenth would be less than the structural cost for the first two?

A. Well, I doubt it now because you have to haul everything up that much higher. As a rule, as you go up the cost is more if you have to haul material from the ground to the roof. The additional cost is substantial for that raise. If you stop at the fourth floor, you have less cost than building the additional floors.

Q. Let me ask you this question, Mr. Slocum. In your opinion, considering this particular structure, do you believe the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth floors cost more or less than the first two floors?

(Testimony of Francis Harvey Slocum.)

A. Well, they would cost more in this case. Where you have so many stores they don't cost very much. Where you have stores, it is very inexpensive, that is the cheapest part of the building, but if we have lobbies and dining rooms, it probably would cost more.

Q. Stores are on the first floor?

A. On the first floor.

Q. Is the second floor more costly than the third, fourth, [444] fifth and sixth floors?

A. No, you have large open spaces, because the stores run up in that space. Where there are other rooms, like banquet rooms, etc., although that is a big area, it costs money to do that, more than the stores.

Q. Of course, I am reminded that the lobby is on the ground floor too?

A. Yes, that is on the ground floor.

Q. Then you have all the excavation work.

A. Yes, the excavation is below that, yes.

Q. And you have all the additional foundation work to hold the upper stories? A. Oh, yes.

Q. That is all an additional expense?

A. Of course, your foundations were figured for 12 stories and of course that naturally cost more than if you first figured for ten.

Mr. Platt: I think that it all.

Recross-Examination

By Mr. Cooke:

Q. With reference to the sky room, Mr. Slocum,

(Testimony of Francis Harvey Slocum.)

and the cost of that particular floor, how does that expense compare with the third, fourth and fifth floor and so on?

A. Well, we are doing a lot of decoration and fancy work up there, which would probably bring it up to about the same [445] cost as the typical room floor would be. The typical room floor is the most expensive floor we have. They have additional plumbing, etc., whereas if we have large areas, although we put a lot of money in decorations, the cost per foot probably wouldn't be as much as the typical room floors.

Q. One would sort of offset the other?

A. Yes, there wouldn't be much difference, because we are putting a lot of money in the sky room floor that we wouldn't put in the typical room floor.

Q. But because it is all one area, that lessens the expense?

A. If it is all in one big area, which it is, it costs less than if it is divided up into small areas with partitions, columns, etc.

Q. You refer to the item of lifting, getting the material, etc., up to the upper stories as increasing the cost of construction of that portion of the building. Is that a substantial item?

A. Well, it is the cost of the elevator and operation of it.

Q. Is that a fairly substantial item?

A. It is quite an item, yes, nowadays. Just how much I couldn't figure out, but it always is a big

(Testimony of Francis Harvey Slocum.)

item. We have to haul material up and then you have to take the other part down. They have men now taking up the forms and it is so far up, it just takes a lot of time.

You stated on your redirect examination that Mr. Moorehead [446] told you on one occasion not to send any more copies of the plans and specifications, etc., to Mr. Denson, that he was out of the picture, do you remember that? A. Yes.

Q. When was that statement made to you by Mr. Moorehead, as nearly as you can fix it? Was it before or after April 1st?

A. It was after that date of the meeting, after April 1st.

Q. Do you know about how long after?

A. I would say a day or so, a couple of days.

Q. Do you have any knowledge of there having been a subsequent meeting between Mr. Denson and Mrs. Mapes and Charles Mapes here in Reno on or about April 10th? A. No, I do not.

Q. You didn't hear them discuss it in any way?

A. No, I didn't, not at all.

Mr. Cooke: I think that is all.

Redirect Examination

By Mr. Platt:

Q. You are certain no instructions were given you prior to April 1, 1946? A. No.

Mr. Platt: That is all. [447]

Mr. Platt: We would like to call Mrs. Charles W. Mapes as an adverse witness, your Honor.

The Court: You may do so.

MRS. CHARLES W. MAPES

one of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. Mrs. Mapes, you are one of the defendants in this action? A. I am.

Q. And your son and daughter are the other two defendants? A. They are, yes, sir.

Q. Your son and daughter are both married, are they not? A. Yes.

Q. And the three of you have lived for some years in your present home in Reno?

A. Yes.

Q. Under the same roof? A. Yes.

Q. During the negotiations which led to the execution of the agreement in evidence here, were you under the advice of your counsel, Mr. H. R. Cooke?

Mr. Cooke: Objected to as irrelevant and immaterial, calling for question of whether she had legal advice as to negotiations. The negotiations themselves are not material, whether she had legal advice or not. We will be obliged to stand on this and analysis of these negotiations, directly or in-

(Testimony of Mrs. Charles W. Mapes.)

directly, have no place in the record before the Court. [448]

The Court: Objection overruled. You may answer the question.

(Question read.)

A. The only time I consulted counsel on this agreement was in the presence of Mr. Denson and my son Charles, is the only discussion before, you say, this agreement was signed?

Q. Mr. Cooke has represented you generally as your counsel, hasn't he, in all your business affairs?

A. Yes.

Q. And it had been your practice and habit to consult with him on all business matters requiring legal services?

A. Yes.

Mr. Cooke: We object to all this.

The Court: This is in the nature of cross-examination?

Mr. Platt: Yes.

The Court: Objection overruled.

Mr. Platt: I don't think it is necessary, but I can refer your Honor——

The Court: I think that is the same as the State rule.

Q. Is it a fact that some time in 1940 that you had a conversation with Mr. Denson and some other persons with respect to your building a hotel in Reno?

A. Mr. Denson and two other gentlemen came to see me in 1940 and asked me at that time to build a hotel for them. [449]

(Testimony of Mrs. Charles W. Mapes.)

Q. And after their visit in 1940 did you confer with Mr. Cooke at all about building a hotel?

A. On this visit in 1940?

Q. At any time after 1940 when you had this visit with these two gentlemen, did you confer with Mr. Cooke about building a hotel?

A. Well, I wonder if I understand your question. Did I ever discuss building a hotel with Mr. Cooke?

Q. Yes.

A. I think it was always my intention, yes, if that is what you mean.

Q. Well, didn't you, prior to 1940, discuss with your attorney, Mr. Cooke, the probability of your building a hotel? A. Yes.

Q. And after you met these two gentlemen at your home in 1940, did you continue to discuss with Mr. Cooke the probability that you would build a hotel.

A. Oh, I possibly did. I always had it in mind that it is going to be built.

Q. Isn't it a fact, Mrs. Mapes, that you always did, that you conferred with him very frequently about the probability that you were going to build a hotel in Reno?

Mr. Cooke: If the Court please——

A. (Interrupting): Well, I believe——

Mr. Cooke (interrupting): Just a moment. What [450] counsel apparently is seeking is to find out if there was any discussion between Mrs. Mapes

(Testimony of Mrs. Charles W. Mapes.)

and myself in regard to the Denson hotel project. There may have been other discussions with other parties that certainly has no bearing upon the Denson arrangements and Denson connection with the project and I object to this question upon the ground it is asking in effect if she ever discussed with me the matter of construction of a hotel for anybody or with anybody, or any kind of hotel. That is entirely irrelevant and outside of any issue in the case.

The Court: It seems to me to be immaterial, but I was just wondering how it is to be construed in the light of the theory of this witness' presence on the stand here as an adverse witness, whether it could possibly be considered proper cross-examination. I do not see how it could be either. I do not see where it would affect anything that has been so far introduced in evidence.

Mr. Platt: What we are trying to do, your Honor, is to show through this witness she was constantly consulting Mr. Cooke in relation to her business interests, involving any legal matters at all.

The Court: What difference does that make in this case? [451]

Mr. Platt: A great deal of difference, your Honor, because issues have been joined and the pleading indicates some advantage, imposition was made and pressed on Mrs. Mapes and we desire to show, and I will state frankly—

(Testimony of Mrs. Charles W. Mapes.)

The Court (interrupting): Objection overruled.
Answer the question.

(Question read.)

A. Well, I really don't know how to answer that because it was just as it would come up at the time that I would confer with Mr. Cooke on any matters pertaining to building or construction. I did ask him different legal questions or something like that, but I don't recall any of this pre stuff from 1940, if that is what you are trying to place, and I know I never talked in 1940 with Mr. Cooke on the hotel with Mr. Denson and these other parties that came in. That is the best I can answer you.

Q. Then I understand your answer to be that neither prior to 1940 or subsequent to 1940 did you discuss general hotel matters with Mr. Cooke?

Mr. Cooke: Same objection.

The Court: Same ruling. I think he was just summarizing.

Mr. Platt: I want to find out what she did testify to.

The Court: Read that statement to Mrs. Mapes.

(Answer read.)

A. I guess I did, I don't know. I would have to have a specific thing brought before me before I could bring up this. I don't have it in my mind.

Q. You testify about an interview with these two gentlemen in 1940 in your home about building a hotel?

(Testimony of Mrs. Charles W. Mapes.)

A. No, they came to me and asked me to build the hotel.

Q. I understand your discussion was about building a hotel with these two men?

A. Yes.

Q. Now did you report to Mr. Cooke this interview? A. No.

Q. You never did report it?

A. No, not that I recall.

Q. Was Mr. Denson, the plaintiff in this action, present at that interview? A. Yes.

Q. When did you see Mr. Denson again in Reno? A. In 1944.

Q. Do you remember about what time of the year it was, Mrs. Mapes?

A. It was in the spring.

Q. Do you recall who were present at that interview?

A. Yes, I was there and my daughter Gloria. I believe that is all. [453]

Q. And Mr. Denson?

A. And Mr. Denson and myself.

Q. Do you recall what was said?

A. Yes, Mr. Denson dropped by and said he was driving through, he was out looking around, had been on a trip, and he came by to say "hello" and he had some oranges, a box of oranges, and was very anxious that we share the oranges with him and he sat down and visited. I think in the course of conversation he said, "I see you haven't done anything with your property," and I said, "No,

(Testimony of Mrs. Charles W. Mapes.)

I am waiting for my son to return from the service."

Q. Was anything further said about your building a hotel? A. No.

Mr. Cooke: I wish—just a moment. I want to interpose an objection, as those embraced in our objections heretofore stated, as to negotiations being an admitted fact, that there was a writing, the basis of plaintiff's cause of action, and signed by the parties September 24, 1945. It is conclusively presumed all prior negotiations must have been merged in that for the purpose of this case.

The Court: Same ruling heretofore made to the same objection. You may answer the question, Mrs. Mapes.

(Question read.)

A. No. [454]

Q. Do you recall that you told Mr. Denson why you were waiting for your son?

Q. Well, it was always our intention to develop the property. It was my husband's idea that this was to be for my son and daughter and at that time he had planned to erect a hotel if he had lived and I was carrying out his wishes.

Q. You mean that this particular property upon which the hotel is now being built was bought for your son and daughter?

A. It eventually would be for the son and daughter, yes, Mr. Platt.

(Testimony of Mrs. Charles W. Mapes.)

Q. That was your husband's request and you always understood——

A. (Interrupting): It was just our conversation, just an understanding.

Q. But you always so understood it?

A. Yes.

Q. But primarily the property was left——

A. (Interrupting): No, not primarily at all, just our intention that this property would eventually be for the benefit of the son and daughter.

Q. Did you tell Mr. Cooke about this interview that you had with Mr. Denson? A. No.

Q. In 1944? A. No.

Q. You didn't mention it to him at all? [455]

A. Not that I recall.

Mr. Cooke: If the Court please, I think it is in the scope of privileged communication. There ought to be some limit to it.

Mr. Platt: Of course we can answer that——

The Court (Interrupting): I think she can answer that question, whether she did or not. Objection will be overruled.

A. You mean after Mr. Denson had been to see me?

Q. Yes, within a reasonable time after, did you tell him about the conversation?

A. No, not that I recall, Mr. Platt.

Q. When did you see Mr. Denson again in Reno, if at all? A. I believe about September.

Q. 1945? A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. Do you remember about when in September?

A. No, I can't give you a definite time on it.

Q. Where did you see him?

A. In my home.

Q. Do you remember who were present with him there?

A. My daughter Gloria and I think my son Charles and myself and Mr. Denson.

Q. What was said at that interview?

Mr. Cooke: Same objection as to preliminary negotiations, [456] your Honor, heretofore made.

The Court: Objection may be deemed made as heretofore stated and the same ruling.

A. I think we just talked generally and he wanted to meet my son Charles. Said he was very anxious to meet him, would like to meet him. I think I had spoken so highly of my son, naturally he would be interested in meeting him.

Q. Well, you signed the agreement, didn't you, Mrs. Mapes? I will call your attention to it later, but you signed the agreement yourself on September 24, 1945, is that true?

A. Yes. Are you talking about 1945 or 1944 now?

Q. I am talking about——

A. (Interrupting): I am talking about '44.

Q. Well, I beg your pardon.

A. You asked me the next time I saw Mr. Denson from the spring meeting?

Q. I am sorry.

The Court: September, 1944.

A. I met him in September, 1944.

(Testimony of Mrs. Charles W. Mapes.)

Q. And you say Charles and Gloria were present? A. Yes.

Q. And did you discuss the hotel at all with him?

A. Not that I recall.

Q. How long did he remain at your home at that time?

A. It was a short visit. I don't recall it very much. [457]

Q. Did he state the object of his visit?

A. Oh, just a friendly visit. He had come back, talked and wanted to meet Charles and was wondering how we were getting along with our plans and if we had done anything, etc., like that.

Q. To what plans did he refer?

A. To the hotel building we were planning, or contemplating building.

Q. Do you remember what you said to him?

A. No, I don't. I think at that time—in 1944—I think at that time we discussed plans, that we were going ahead on any plans, but we were discussing the hotel.

Q. I don't want to misconstrue what you said, but do you mean that in September, 1944, when you talked to Mr. Denson at your home, you then discussed plans?

A. No, no, I am sorry. I am getting '44 and '45 mixed up.

Q. Do you mean prior to that time?

A. Prior to that time we had discussed it. It was in '45 that any plans were discussed.

(Testimony of Mrs. Charles W. Mapes.)

Q. Then my understanding is that when Mr. Denson visited you in September of 1944 you didn't discuss any plans of any hotel at all?

A. I believe in '44 we did, yes.

Q. Do you remember what Mr. Denson said you said and Charles said, if anything, and Gloria said?

A. Well, really the first discussion that came up is when Mr. Moorehead came to see me about plans and that is when plans were entered into and discussed.

Q. I think we will reach that a little later.

A. That is why I am getting all confused because I don't know as I discussed with Mr. Denson at any time about plans and that is why I am getting confused.

Q. Well, we are trying to get the truth and I want to understand what your testimony is and if you don't understand my question I wish you would ask me to repeat it so I can make it clear, and what I am trying to do now is to find out whether at this interview with Mr. Denson in September, 1944, you discussed with him plans of the contemplated hotel?

A. I don't recall, no.

Q. You don't remember whether you did or not?

A. In 1944, no.

Q. You don't recall? A. No.

Q. If there was such a conversation, you don't remember it? A. No.

Q. Do you remember when, if at all, you saw Mr. Denson again?

A. Not definitely I wouldn't recall. The definite

(Testimony of Mrs. Charles W. Mapes.)

part would be in August of 1945, when we looked at plans. I think Mr. Denson had called on the telephone several times but what we talked about I don't just recall his conversations. [459]

Q. You say Mr. Denson talked to you over the phone several times during the year 1945?

A. I don't remember, Mr. Platt. He might have, yes.

Q. Well, do you remember or don't you remember?
A. No, I don't remember.

Q. Didn't I understand you to say a few minutes ago, Mrs. Mapes, that Mr. Denson had talked to you over the phone several times?
A. Yes.

Q. Well, was that in 1945 before he saw you later in '45?

A. In '45, yes, he talked to me on the phone in '45.

Q. Well, did he visit your home in '45?

A. Yes.

Q. And about when was that?

A. Let me see. Well, he was at our home in September in '45, around the 24th of September.

Q. Well, on September 24, 1945, you yourself personally signed the agreement in evidence here, didn't you?
A. No.

Q. I show you, Mrs. Mapes, Plaintiff's Exhibit "C," which is the agreement and which bears date September 24, 1945.
A. Yes.

Q. Do you recognize that? I show you what pur-

(Testimony of Mrs. Charles W. Mapes.)

ports to be your signature, Irene Gladys Mapes, first party. A. Yes. [460]

Q. Is that your signature? A. Yes.

Q. Do you remember when you signed that?

A. Yes.

Q. When?

A. October 4th, around October 4th.

Q. Do you know whether or not this agreement, with your own personal signature on it, was sent by your attorney, Mr. Cooke, to Mr. Denson at Los Angeles, that it was signed by you personally on the 24th of September, sent by Mr. Cooke to Los Angeles, that later Mr. Denson came to Reno and met you in Mr. Cooke's office and he signed this agreement on October 4th? A. No.

Q. Is that true or isn't it?

A. No, not to my recollection.

Q. Well, you say that Mr. Denson visited you in 1945 about the 23rd of September, did you say?

A. Yes.

Q. Did you see any proposed copy of this agreement on September 24, 1945? A. Yes.

Q. Where did you see it?

A. As far as I can recall it was in Mr. Cooke's office on the 24th and it was a paper in triplicate that Mr. Denson had brought and Mr. Cooke penciled the thoughts of all present or [461] the legal suggestions, thoughts. That is my recollection of the paper.

Q. The terms, conditions, covenants and lan-

(Testimony of Mrs. Charles W. Mapes.)

guage of this agreement were all clearly understood by you, weren't they? A. Yes.

Q. They were all explained to you, weren't they, by Mr. Cooke? A. Yes.

Q. You had a complete understanding of every-think and what it meant?

A. I don't think, when you asked if they were explained by Mr. Cooke—I think I had an understanding of what that meant, yes, it wasn't explained to me. I read it and understood what it meant.

Q. Did you discuss the terms, conditions, covenants and language of this agreement?

A. No, not the language, that is *write* down. I read the paper and understood what it meant.

A. In this agreement, Mrs. Mapes, it is provided that Mr. Denson is to pay you, on its execution and signing the sum of ten thousand dollars in cash or lawful money——

Mr. Cooke: Objected to as assuming a fact not in evidence. There is no such recital in the contract. The two parties were to put up twenty thousand dollars.

Mr. Platt: Well, if your Honor please, I would like to be permitted to finish my question. [462]

The Court: Finish the question and then if Mr. Cooke wishes to interpose an objection at that time he may do so.

Q. ——and that your son, Charles W. Mapes, is to pay you an equal amount?

Mr. Cooke: We object as assuming a fact not in

(Testimony of Mrs. Charles W. Mapes.)
evidence. There is no such provision in the contract.

Mr. Platt: We submit there is.

The Court: May I see the contract? The first paragraph of the contract recites: (Page 2) "In consideration of the premises and for other valuable and sufficient consideration * * * that contemporaneously with the execution and delivery hereof, the second parties shall deposit with first parties twenty thousand dollars in cash as a guaranty of their good faith." How does that differ from the statement Mr. Platt made, Mr. Cooke?

Mr. Cooke: Well, that is a joint obligation, is our contention; that this is obligation of each to put up twenty thousand dollars if the other fails. There is nothing in there says Mr. Denson shall put up ten thousand and Charles Mapes the other ten.

Mr. Platt: Do you mean to say that Mr. Denson is to put up twenty thousand and Mr. Mapes twenty thousand? [463]

Mr. Cooke: No. Just like signing a note jointly. They agree to pay twenty thousand and if Mr. Denson did not put up and Mr. Charles Mapes wanted to go in, he would have to put up the full twenty thousand in order to keep the contract alive and the same is true of Mr. Denson. We have heard a lot about his putting up ten thousand dollars and——

Mr. Platt (Interrupting): I must state I am astonished at that statement.

Mr. Cooke: You will be astonished a lot more times.

(Testimony of Mrs. Charles W. Mapes.)

Mr. Platt: I expect to be before I get through.

The Court: Gentlemen. It says, * * * second parties shall deposit with first parties the sum of twenty thousand dollars." It does not state, as recited by Mr. Platt in his question, that it provides ten thousand dollars is to be paid by Mr. Denson and ten thousand dollars to be paid by Mr. Charles Mapes. just twenty thousand dollars to be paid by second parties. Now, does it make any difference whether one or all?

Mr. Platt: I don't think so, your Honor. I withdraw the question and will clarify it further on by the acts of the party.

Q. I hand you, Mrs. Mapes, Plaintiff's Exhibit "A" which purports to be a check signed by Peter D. Denson, dated October 4, 1945, and payable to you. I will ask you if you have [464] ever seen that check before? A. Yes.

Q. When did you get that check?

A. October 5th, I believe.

Mr. Cooke: Just a moment. It is not material; it is admitted in the pleadings.

The Court: This is cross-examination. Objection overruled. The answer may stand. She stated October 5th.

A. Around October 5th.

Q. Wasn't it October 4th, the day Mr. Denson signed this contract?

A. Well, it could have been, yes.

Q. Did you see him make out the check?

A. Yes, I believe I did; yes, I did.

(Testimony of Mrs. Charles W. Mapes.)

Q. And he made it out on the same date and time that he signed the contract? A. Yes.

Q. Did you cash this check?

A. Yes, I did, I deposited it.

Q. Has your son, Charles W. Mapes, ever paid you ten thousand dollars? A. No.

Q. Did you ever ask him for it?

A. No, I asked him about it one time, what about the other [465] ten thousand dollars.

Q. Well, you never expected him to pay it, did you? A. Oh, yes.

Q. When?

A. Well, I knew I could get it any time I demanded it. I believe, Mr. Platt, that was clear but it was never definitely stated——

Q. (Interrupting): If you will just answer the question. You say you expected to get it from Charles if you ever demanded it?

A. No; I asked Charles about the rest of the money, what about the twenty thousand in total.

Q. When did you ask him that?

A. After this check has been deposited, had been given to me.

Q. What did Charles say?

A. He said, "Mother, we will wait until we get together. When we get together with Mr. Denson in an agreement as associates, at that time we will pay the rest of the money."

Q. Now let me understand your answer, Mrs. Mapes. You testify that on October 4th you accepted this check from Mr. Denson? A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. And that you later deposited it to your account? A. Yes.

Q. Now when, after the acceptance of that ten thousand [466] dollar check from Mr. Denson did you talk to your son, Charles W. Mapes, about his paying his ten thousand?

A. Well, I don't think it was in the sense of his paying his ten thousand—when I was to get the twenty thousand in full.

Mr. Platt: Will you read the question?

(Question read.)

Mr. Cooke: Objected to as assuming a fact not in evidence.

The Court: I think that is true.

Mr. Platt: This is cross-examination; an adverse witness.

The Court: However, she has already answered that question.

Mr. Platt: The reason for putting the question this way is because she did talk to her son about it and I am trying to find out when.

The Court: The answer may stand.

Q. Did you ever make a demand on your son to pay ten thousand dollars?

A. No, I didn't.

Q. And you haven't done it yet?

A. No, I understand I could always get it.

Mr. Cooke: Wait a minute. We object to that on the ground it is incompetent, irrelevant, and immaterial whether she has done that yet, and I object

(Testimony of Mrs. Charles W. Mapes.)
to the question [467] as to any demand ever made, upon the ground there is no occasion or any reason or anything in the contract that requires her to make a demand. They are supposed to put up this 20 thousand dollars. Whether it comes from one or the other or both is immaterial.

The Court: I think she has already answered in response to a former question that she never made any demand upon her son Charles. The answer may stand. As far as this next question, it seems to me it is already answered by the former question, she never made demand.

Mr. Platt: That is right. It is comprehensive.

Q. Did you ever make a demand on Mr. Denson for an additional amount than the ten thousand dollars he paid you? A. No.

Mr. Cooke: I move to strike the answer until I make my objection.

The Court: The answer may go out. Make your objection.

Mr. Cooke: We object on the ground there is nothing in the contract requiring any demand to be made. The contract requires they put money up for the execution of the document.

The Court: The objection will be overruled. Answer the question now. A. No. [468]

Q. I call your attention, Mrs. Mapes, again to Plaintiff's Exhibit "C," which is the agreement signed by all of the parties to it, particularly page 3 and paragraph 5, which reads as follows: "That the rental for such structure when completed, with

(Testimony of Mrs. Charles W. Mapes.)

the exceptions noted above, shall be as follows: 5% of the gross receipts from food sales, 10% of the gross receipts from liquors, wines and beer sales, 30% of the gross receipts from hotel rooms and apartments." Did you, prior to the signing of that agreement, discuss the rental royalties as stated there with your counsel, Mr. Cooke?

Mr. Cooke: Objected to on the ground it is incompetent, irrelevant and immaterial, as to whether it was discussed or not. The agreement is conclusive evidence.

The Court: Objection overruled. You may answer the question. A. No.

Q. You never discussed that with Mr. Cooke?

A. Before signing?

Q. Yes.

A. It was all agreed on there and when it was signed, no. That was Mr. Denson's—

Q. (Interrupting): I don't want to misunderstand you and I hope you won't misunderstand me, but what I am asking you, Mrs. Mapes, as to whether you discussed with Mr. Cooke these rentals that were to be paid you by your son, Charles, and Mr. Denson, representing 5 per cent of gross receipts from food sales, 10 per cent of gross receipts from liquor, wines and beer sales, 30 per cent of gross receipts from hotel rooms and apartments.

Mr. Cooke: Object to that, if the Court please. That is taking in too much territory. If he means prior to the time it is signed, I think he ought to change his question.

(Testimony of Mrs. Charles W. Mapes.)

Mr. Platt: I will change it to that extent—prior to the time of signing. I think that was understood by the question.

Mr. Cooke: Don't depend too much on what was understood.

A. I knew of those rates. When you discuss things you usually take it apart, don't you? That is my idea of a discussion. I don't know what you mean.

Q. When did you first learn of these rates and when did Mr. Cooke first learn of these rates?

Mr. Cooke: Mrs. Mapes is not competent to testify when I first learned of the rates.

The Court: The latter part probably is subject to that objection.

Mr. Platt: I think that is right, your Honor. I can question Mr. Cooke to find that out.

A. What was the question again? [470]

Q. When did you first learn of these rates of rental that was in that agreement?

A. Mr. Denson brought the paper with those rates on it. He had it in triplicate, to my home. That was, I would say the 23rd and 24th.

Q. Of September?

A. And 22nd, yes, of September. That was the first I had ever seen it.

Q. Well, did you ever discuss with anybody else the proper and appropriate rentals for rentals of this type and character?

A. No, I did not.

(Testimony of Mrs. Charles W. Mapes.)

Mr. Cooke: I move to strike the answer until I can make my objection.

The Court: The answer may go out, and what is your objection?

Mr. Cooke: It is incompetent, irrelevant, and immaterial as to whether she discussed with anybody the matter of these percentages. How can that have any bearing here and what possible bearing could that have in helping your Honor to determine whether there is a contract here for specific performance?

The Court: I think that is right.

Mr. Platt: The issues in this case practically deny the equities of this contract, if your Honor please. I mean it is very difficult to comprehend just what the answer [471] does mean in some respects, but the issue, I think, is joined upon the proposition that these rents are not adequate.

The Court: Well, the objection will be overruled and you may answer the question. You understand the question, Mrs. Mapes?

A. If I discussed with any one else on these prices?

The Court: Yes.

A. No, I did not.

Q. Do you know whether your attorney did?

A. No.

Mr. Cooke: Move to strike the answer. Don't answer so quick, Mrs. Mapes. Move to strike the answer so I can make my objection.

(Testimony of Mrs. Charles W. Mapes.)

The Court: The answer may go out. What is your objection?

Mr. Cooke: The objection is it is incompetent, irrelevant and immaterial whether I discussed it with anybody else. That wouldn't be evidence Mrs. Mapes knew anything about it, if I had discussed it.

The Court: In view of her statement, Mr. Platt, she never discussed it with anybody, I can't see how——

Mr. Cooke (Interrupting): He asked whether I had discussed it with anybody.

The Court: Objection will be sustained. [472]

Q. Did you and Mr. Cooke ever discuss these 5 per cent of gross receipts from food sales and 10 per cent of gross receipts from liquors, wines and beer sales and 30 per cent of gross receipts from hotel rooms and apartments, whether that was a reasonable rental? A. No.

Mr. Cooke: Just a moment.

Witness: Excuse me.

The Court: The answer may go out.

Mr. Cooke: We wish to interpose an objection there. The question is indefinite as to time, whether before September 24, October 4th, or afterwards. If afterwards, it is incompetent, immaterial and irrelevant. If before, it would be equally incompetent, irrelevant and immaterial as being a covenant. Object on the further ground it hasn't any bearing on or connection with the proposition whether the contract is fair or not. The matter of whether Mrs. Mapes thoroughly understood the contract and

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Gloria Mapes and Chas. W. Mapes Company,
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VOLUME II

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for the District of Nevada

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(Testimony of Mrs. Charles W. Mapes.)

signed it with her eyes open and through understanding, hasn't anything to do with whether it is fair or not. The fairness and equity of it is a matter to be determined, I apprehend, not upon consideration of what the parties understood at the time. They may have fully understood or only partially understood it, but it is to be determined on consideration of what the results of the contract would be, how it will operate, whether it will be equitable [473] and fair and reasonable. That is the allegation in the complaint, and that is the test. It has to be fair and reasonable and equitable to both parties before it can be specifically enforced. What they understood and who they talked to and what Tom, Dick and Harry on the outside understood, is entirely immaterial. If the contract will produce a return that will pay on the investment, a proper return, that your Honor will find on that basis as will be fair, reasonable and equitable, that is the real test and that did not operate inequitably in other respects, but as to whether they knew and understand that they were signing has absolutely nothing to do with it. Whether the attorney talked to somebody, has nothing to do with it. Whether it is a fair and equitable contract, is the question I am making.

The Court: The objection is good as to indefiniteness of time. It doesn't show when.

Mr. Platt: I mean prior to the execution of the contract.

The Court: Objection is overruled and answer

(Testimony of Mrs. Charles W. Mapes.)
the question. It is understood it relates to time shortly prior to the execution of the contract.

A. No.

Q. Was the question of the rental values, as shown by the percentages of gross receipts, discussed immediately prior to the execution of the contract with Mr. Denson, the plaintiff in [474] this action.

Mr. Cooke: Objected to upon the ground it is within the rule prohibiting evidence of preliminary negotiations where a contract is finally signed and all merged together, and it is immaterial and irrelevant and any evidence whatever as to what the contract means, as to what they said or talked about, is objectionable.

The Court: The objection is overruled. You may answer the question.

A. As to the different percentages?

Q. Yes.

A. No, it wasn't discussed actually as to the different percentages, no.

Q. Well, when these percentages were submitted to you, did you offer any objection to them?

Mr. Cooke: We object on the same ground, irrelevant and immaterial.

Mr. Platt: I desire to call your Honor's attention to the fact the allegations in their answer indicate, or at least allege, that there was no meeting of the minds, notwithstanding the fact that all of the parties signed this contract, and I am trying to find out whether there was a meeting of the minds.

(Testimony of Mrs. Charles W. Mapes.)

The Court: Objection will be overruled. You may answer the question. [475]

(Question read.)

A. Not to the percentages such as they are set up there, no.

Q. When you signed the contract, as you say on October 4th, at least when Mr. Denson signed it in your presence, did either you or Mr. Cooke offer any objection to the percentage value of rentals?

Mr. Cooke: Objected to as irrelevant and immaterial as to whether any objections were made or not. That contract which was signed, so far as percentages was concerned, is conclusive upon the parties. As to statement of Mr. Platt and the issue as to the meeting of the minds of the parties, that must be determined by the agreement itself and hence the document must be allowed to speak for itself, and we intend to stand upon the proposition that the paper itself shows there was not any meeting of the minds, that was a preliminary agreement, says they will get together later and enter into a lease; that is what we go on. We do not rely on talks had before that, so that the allegations made there about there being no meeting of the minds must finally be determined on the basis of the document itself, because that couldn't be determined by going back to preliminary negotiations, in the absence of fraud or mistake, would have no application here.

(Testimony of Mrs. Charles W. Mapes.)

The Court: The objection will be overruled. Answer the question.

(Question read.) [476]

Q. There is another provision in this agreement, namely: "All rentals payable monthly," did either you or Mr. Cooke, when Mr. Denson signed this contract, offer any objection to that?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. No.

Q. There is a further provision in the contract: "Provided, in the event the said perecentages of gross receipts shall not equal monthly for the coffee shop, dining room and kitchen \$600, for the lounge \$1000, for the sky room \$333.33, for the mezzanine floor banquet room \$150, then in such case the second parties shall make up and pay to the first party the deficiency on any such four classifications so appearing." Did you or Mr. Cooke, when this contract was finally executed, offer any objection to that?

Mr. Cooke: Objected to as immaterial. The witness already stated she fully understood the agreement, read it over; and that is part of preliminary negotiations.

The Court: Objection overruled.

A. No.

Q. Paragraph 6 of this agreement provides that:

"Said lease shall provide that second parties
* * * "which are Mr. Denson and your son Charles

(Testimony of Mrs. Charles W. Mapes.)

“* * * are to execute and deliver to the first party * * *” which is you “* * * a first chattel mortgage covering the furniture, fixtures and equipment placed in the [477] hotel and apartments aforesaid to secure rental payment as provided in said lease.” Did either you or Mr. Cooke at or before the final execution of this contract, object to that provision?

Mr. Cooke: Same objection.

The Court: Same ruling. You may answer the question.

A. No.

Q. Did you or Mr. Cooke object to this provision in the contract at or before the final execution of it, namely: “That after said lease is executed between the parties heretofore and if the second parties fail to fully provide and place said furniture, fixtures and equipment in said hotel rooms and apartments as aforesaid, if they fail to execute a valid chattel mortgage and said security as herein required, then the cash so deposited with the first party” * * * which is you, “* * * shall belong absolutely to the first party as a consideration for her entering into this agreement.” Was there any objection offered to that? A. No.

Q. Paragraph 8 I ask you the same question as to that: “If after said lease is executed between the parties hereto, as above provided, and second parties provide and place furniture, fixtures and equipment in said hotel and apartments as aforesaid and the second parties execute and deliver said

(Testimony of Mrs. Charles W. Mapes.)

chattel mortgage as security as herein required, then the cash so deposited [478] with first party shall belong to and be delivered to said second parties by said first party."

Mr. Cooke: Same objection.

The Court: Same ruling. Answer the question.

A. No.

Q. Calling your attention to paragraph 9 of the agreement, I ask you whether at or about the time of the final execution of this document, you or Mr. Cooke offered any objection to this paragraph: "The second parties, as part of said lease, will guarantee to said first party that the total annual income from the entire building which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money and to amortize the cost of said building within said lease period."

Mr. Cooke: Same objection.

The Court: Same ruling.

A. No.

Q. Mr. Denson and your son Charles, according to this paragraph, guaranteed to pay you an amount sufficient to cover payments required by you for taxes, upkeep, insurance, interest on borrowed money and to amortize the cost of said building within said leased period. Did you or Mr. Cooke object to that?

Mr. Cooke: Same objection.

The Court: Same ruling. [479]

A. As I recall, that took in the stores, didn't it

(Testimony of Mrs. Charles W. Mapes.)

also, that they would make up the difference with the stores included?

Q. Well, in any event, I mean, as a matter of fact, Mrs. Mapes, wasn't the first understanding that the stores were not to be included?

A. Yes.

Q. And you heard Mr. Denson testify here and he testified that he wanted a change made in that paragraph so that the income from the entire building, including the stores, would be comprehended in that paragraph?

A. In that paragraph, yes.

Q. And that you later agreed to that and it was inserted by interlineation as it appears now on this final executed contract?

A. Yes.

Q. With your initials, I take, "IGM" and Mr. Denson's initials, "PGD" on the margin?

A. Yes.

Q. You both initialled on that date, October 4th?

A. Yes, we all agreed to it.

Q. Paragraph 10 provides: "That said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement, and also to definitely set forth all usual and necessary conditions, to the end that the rights and interests [480] of each party shall be properly conserved and protected." Did you or Mr. Cooke offer any objection to that paragraph?

Mr. Cooke: Same objection.

(Testimony of Mrs. Charles W. Mapes.)

The Court: Same ruling.

A. No.

(Short recess.)

Mrs. Mapes resumed the witness stand on further examination by Mr. Platt.

Q. In paragraph 5 of this exhibit, which is the agreement, there is a statement: "All rentals payable monthly." Did either you or Mr. Cooke at or about the time this agreement was executed, offer any objection to that?

A. No.

Mr. Cooke: Objected to on the same ground as to the other matters, entirely immaterial, and all objections heretofore to the same question.

The Court: Objection overruled. The question may be answered. I think the question was answered, was it not, Mrs. Mapes?

A. I will answer it now as no.

Q. It was your understanding, Mrs. Mapes, wasn't it, that these provisions in the contract which I have read to you were to be incorporated in a lease later to be executed?

A. No, not necessarily, Mr. Platt. It was my understanding [481] that this agreement was preliminary and at a later date we were to get together and I was supposed to be taken care of in this final—if we agreed to agree on this final contract. That is my understanding.

Q. Well, do you mean to say when Mr. Denson and your son Charles obligated themselves to pay

(Testimony of Mrs. Charles W. Mapes.)

you 5 per cent of gross receipts from food sales, 10 per cent of gross receipts from liquors, wines and beer sales, and 30 per cent of gross receipts from hotel rooms and apartments and to guarantee that if the gross receipts did not equal a particular amount set out in this agreement as I have read to you, and did agree to furnish the hotel suitably and give you a chattel mortgage on the furniture as security for payment of the rent and to guarantee sufficient payments to you so as to pay your taxes and insurance and to amortize the debt within a given period, your own debt, that that wasn't a final agreement? A. No.

Q. Do you mean to say, Mrs. Mapes, that after you had executed this agreement that you reserved the right and the privilege to change this agreement any way you wanted to?

Mr. Cooke: Objected to as irrelevant and immaterial. Whether she did or did not would make no difference. The document speaks for itself.

The Court: Objection overruled. You may answer the question. [482]

A. I signed this as a preliminary agreement, later to get together to agree to agree if we could agree, and that was my understanding and this wasn't definite. This is Mr. Denson's idea. This isn't my idea, Mr. Platt. Mr. Denson brought this paper with these percentages. That isn't my percentage. I think I can put that over clearly to you. This is Mr. Denson's, not my idea.

Q. So did you understand that Mr. Denson was

(Testimony of Mrs. Charles W. Mapes.)

to pay at least his part of twenty thousand dollars, pay you ten thousand dollars?

Mr. Cooke: Objected to as irrelevant and immaterial. The paper speaks for itself.

The Court: Objection overruled.

A. This was Mr. Denson's idea. He was very anxious that we get together on this preliminary agreement. He said it didn't mean anything, it was a preliminary agreement. This was Mr. Denson's idea, as far as amounts of money supposed to be paid, but on this agreement nothing was said who was to pay what or how much of that twenty thousand dollars and he advanced ten thousand himself.

Q. And you took it? A. Yes, I took it.

Q. And you demanded it?

A. I didn't demand it. I accepted it.

Q. And it is so provided in the agreement? [483]

A. That I accept the ten thousand from Mr. Denson?

Q. That is that he and your son were to pay twenty thousand?

Mr. Cooke: Objected to. The agreement speaks for itself.

A. Yes.

Mr. Cooke: Just a moment, Mrs. Mapes, don't answer so quick.

The Court: Objection overruled. You may answer the question.

A. Yes, that there was twenty thousand to be

(Testimony of Mrs. Charles W. Mapes.)

paid on that preliminary agreement. Who was to pay who, it was never discussed.

Q. What did you understand paragraph 1 to mean of the agreement which I read to you: "That in consideration of the terms and for other valuable and sufficient consideration, receipt whereof is hereby mutually acknowledged by the parties, that contemporaneously with the execution and delivery hereof, the second parties shall deposit with the first party the sum of \$20,000 in cash as a guaranty of their good faith and by way of inducement for the first party to enter into this agreement." What did you understand that to mean?

Mr. Cooke: Objected to as irrelevant and immaterial as to what she understood. She signed the document and the document must speak for itself as to what it means.

The Court: Objection overruled. [484]

A. I don't know as I took each paragraph. I was just interested in the fact that was a preliminary paper, that we were later to get together actually to see if we could agree. I don't know as I took each one of these paragraphs.

Q. Were you advised by Mr. Cooke this was only a preliminary document and you were not bound by it at all?

A. That is my understanding.

Q. Did he so advise you?

A. I signed it with that understanding.

Q. Well, did Mr. Cooke advise you that this

(Testimony of Mrs. Charles W. Mapes.)
agreement was preliminary, a piece of paper, and you could violate it any time you wanted to?

Mr. Cooke: Objected to on the ground it calls for privileged communication.

The Court: There may be something to that objection.

Mr. Platt: I submit, if the Court please, counsel can't lie behind a clock like that, not on the state of the pleadings here, because he is a definite party to this agreement; he is a definite adviser of Mrs. Mapes and it is in the testimony that he is and that she acted upon his advice. Certainly we are qualified to bring in evidence to show that she did act upon his advice and that she understood the binding nature of this agreement.

The Court: You may ask her if she acted on the advice of Mr. Cooke, but not ask what the advice of Mr. Cooke was. I think that would be confidential. Objection sustained.

Q. What did Mr. Cook advise you as to the binding nature of this agreement, if he advised you anything?

Mr. Cooke: Objected to on the ground it is irrelevant and incompetent what the advice was, that it is within the rule of privileged communication between attorney and client; that it is irrelevant and immaterial; that there is no issue here as to this contract being made under a mistake or fraud, simply a question of what it means and the black and white of the contract must govern. What

(Testimony of Mrs. Charles W. Mapes.)

Mrs. Mapes understood or what her attorney advised is entirely immaterial.

The Court: Objection sustained.

Q. Were you present in Mr. Cooke's office on the 23rd of September, 1945, when there was submitted for Mr. Cooke's consideration a tentative draft of an agreement?

A. No. You say September 23rd? That is a Sunday, I believe, Mr. Platt. If that is a Sunday, I wasn't. I have the day of September 24th being Monday.

Q. Well, were you in Mr. Cooke's office any time during the month of September, 1945, when Mr. Denson submitted a tentative form of agreement? A. Yes.

Q. And what day do you say that is, as nearly as you recall?

A. That was my recollection it was September 24th. [486]

Q. Well, did you hear Mr. Denson say to Mr. Cooke, "You put this in legal form"?

A. No. I brought it to Mr. Cooke to have it put in legal form.

Q. Did you tell Mr. Cooke to have it put in legal form? A. Well, that was my understanding.

Q. Is that your best recollection? A. Yes.

Q. And why did you tell Mr. Cooke to have it put in legal form?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: Objection overruled.

(Testimony of Mrs. Charles W. Mapes.)

A. Well, I don't think it was exactly in legal form. I asked him to do it. I asked him if we were signing this paper that we have it written up in as correct form as we could have it.

Q. You testified first you told Mr. Cooke to put it in legal form and now you say you don't remember whether you told him that or something else. Which is the fact?

A. It was supposed to be brought out as a lawyer and attorney would write it up, that was my intention.

Q. That was your intention? A. Yes.

Q. That a lawyer and attorney would write it up?

A. Yes, put it in a readable form. I wouldn't sign anything from anybody. [487]

Q. On or about the 10th day of November, 1943, your son Charles W. Mapes and your daughter Gloria Mapes executed and delivered to you a power of attorney, didn't they? A. Yes.

Q. And do you know at the time of the execution of that power of attorney what property Gloria and Charles owned in Nevada? A. Yes.

Q. What was it?

A. Do I mention each parcel?

Q. Well, I don't want it quite as technical as that.

A. May I say one-third interest in our estate?

Q. That would be the general statement?

A. A third interest in our estate.

Q. Well, is that the fact? A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. That you and Charles Mapes and Gloria each had a one-third interest in your husband's estate?

A. Yes.

Q. And that was the status of your property interests at the time you executed this power of attorney on November 10, 1943?

Mr. Cooke: She didn't execute it, did she?

Q. Or your son or daughter executed it?

A. Yes.

Mr. Platt: Thank you for the correction. If the [488] Court please, I offer a certified copy of this recorded power of attorney in evidence.

Mr. Cooke: The offer is objected to, if the Court please, on the ground it is irrelevant and immaterial to any issue in the case. It simply purports to be a power of attorney from Charles Whitcraft Mapes, Jr., and Gloria Mapes, to Mrs. Charles W. Mapes of the same place, as attorney in fact, giving her broad power to collect and receive all sums of money, etc., that may be due to them on the property in this county. There is nothing to show that at this time the property in question here, namely the lot on which the hotel is constructed, is a part of the property covered by the power of attorney. That the lot, as a matter of fact, was in the name of Mrs. Mapes for some considerable time subsequent to the death of her husband and it was later deeded over and is now, by the allegations in the answer in this case, two-third interest in it to Charles and Gloria. We contend that the power of attorney would be incompetent for any purpose of notice, if that is

(Testimony of Mrs. Charles W. Mapes.)

Q. Mrs. Mapes, you and your son, Charles W. Mapes, and Gloria Mapes organized a co-partnership, didn't you? [491] A. Yes.

Q. Do you recall about when that was organized? A. It was in 1943.

Q. In '43? A. Yes.

Q. Was that co-partnership organized in writing by articles or agreement of co-partnership?

A. Yes, it was registered in Carson. Registered as—it isn't a corporation, but it is registered as a name.

Q. It is a co-partnership?

A. It is a co-partnership.

Q. And that co-partnership was doing business under the name of Charles W. Mapes Company of Reno, Nevada? A. Yes.

Mr. Platt: May I ask counsel if he has a copy of the Articles of Co-partnership?

Mr. Cooke: I think so. I may not have them with me though. They are probably in the general file in the office.

Mr. Platt: Well, that was an unexpected request, your Honor.

Mr. Cooke: I think they are in another file. I can get them for you this afternoon, Mr. Platt.

Mr. Platt: Yes, if you will produce it later.

Q. I call your attention, Mrs. Mapes, to a certified copy of deed purported to have been executed by you to the co-partnership. [492] I hand you a

(Testimony of Mrs. Charles W. Mapes.)

certified copy of it. Do you recall having executed that deed? A. Yes, I did.

Mr. Platt: We offer it in evidence.

Mr. Cooke: The offer is objected to, if the Court please, on the ground it is irrelevant and immaterial to any issue in this case; that it is merely a deed of conveyance by Gladys Irene Mapes to herself and to her son, Charles W. Mapes, and Gloria Mapes as persons doing business under the name of Charles W. Mapes Company and it is made in the usual form of a grant, bargain and sale deed to the second parties as joint tenants with the rights of survivorship, and that includes the lot upon which the hotel building is constructed. Then it recites the consideration received, etc. The point of our objection is that it has no materiality in the case and none as stated by counsel as to what he can prove in this case here presented to your Honor, whether or not the written document constitutes such a document as you can decree specific performance. As to whether it constitutes a right to make a contract, that is a matter for future consideration, but that paper is signed by the parties, it is admitted by the pleadings and cannot offer by the witness any question about that, and the question then is here whether or not it is such a paper as specific performance can be decreed on it. It was made November 6, 1945, about two weeks or more after the September [493] 24, 1945, agreement was made, but in what way that would aid your Honor in determining the sufficiency of the September 24, 1945,

(Testimony of Mrs. Charles W. Mapes.)

document to decree specific performance, is something I can't understand and that is why I am objecting.

The Court: This offer is on cross-examination and let me ask this question to see if I can get an understanding of this branch of the case. Suppose this property described in the exhibit "C," the contract, was not owned by Mrs. Mapes or by Charles Mapes, wouldn't that be a point in determining whether or not specific performance should be decreed? You certainly wouldn't expect the Court to decree specific performance or damages or any relief if the parties to this contract did not have ownership or control of the ground. Doesn't this go to that point, or does it?

Mr. Platt: No, if your Honor will permit me. It has been admitted by the pleadings that at the time of execution of this agreement Mrs. Mapes was seized in fee of that property, that is admitted. Now subsequent to that time the execution of the contract—they set up a so-called affirmative defense, whereby for some purpose or other, I don't know whether the purpose was to defeat the contract or not, but they set up that one-third interest in that property was conveyed to the [494] daughter, Gloria Mapes, and that she had no knowledge of the agreement. Of course, if she had knowledge of the agreement, she would undoubtedly be bound. That is a matter of proof, but we expect to prove that the affirmative defense set up, namely that one-third interest in this property was deeded to Gloria, is not

(Testimony of Mrs. Charles W. Mapes.)

in accordance with the record facts; that this one-third interest was conveyed to a co-partnership, of which Gloria, her brother, Charles Mapes, and Mrs. Mapes were a party and that all members of the co-partnership are deemed to have knowledge of the acts of the co-partnership and the act of one binds all. Now it is in definite contradiction of that allegation in the affirmative matter set up in the answer, and that is the purpose of introducing it.

The Court: Objection will be overruled. The exhibit may be admitted as Plaintiff's Exhibit "N."

Mr. Platt: I won't stop to read it all to your Honor, I just want to read the conveying portion.

(Reads from Exhibit "N".)

Q. Going back for a moment to the certified copies of the two powers of attorney that have been introduced and admitted in evidence here, may I ask you, Mrs. Mapes, that at the time those two powers of attorney were delivered to you did you, at that time, have any interest with your son and daughter in the properties referred to in the power of attorney giving you full and complete power of attorney and right to act and for in [495] their place and stead? Do you understand that question?

A. Yes. I had an interest.

Q. Then I may ask whether you understand that they were powers of attorney coupled with an interest? If you don't understand the legal significance, you did understand that you had an interest with them in the property?

A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. Referred to generally in the powers of attorney? A. Yes.

Q. And neither one of those powers of attorney have ever been revoked? A. No.

Q. They are still in full force and effect?

A. Yes.

Q. Mrs. Mapes, of course you are acquainted with Mr. Moorehead, who was called as a witness here? A. Yes.

Q. And he has been acting for you as construction builder for your hotel?

A. Yes, construction builder.

Q. And is still acting in that capacity?

A. Yes.

Q. Do you recall when you first met him?

A. Some time in '44.

Q. Prior to that time had you a conversation with Mr. Denson, [496] the plaintiff, concerning Mr. Moorehead? A. No.

Q. Did Mr. Moorehead tell you that he had talked to Mr. Denson? A. When?

Q. Before he came to see you? A. No.

Q. He didn't? A. No.

Q. Where did you meet him in 1944?

A. In my home.

Q. Do you remember about what month it was?

A. It was in the summer. I couldn't tell you exactly.

Q. Was he alone when he visited you?

A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. Was Mr. Denson's name mentioned in the conversation?

A. I think he said that he had heard from somebody in Los Angeles about my building a hotel here and that Mr. Denson had told him about who I was and my name in that conversation.

Q. And did you tell him that you knew Mr. Denson?

A. Yes. I don't know as I told him. I think it was mentioned. I said I knew him.

Q. And what was the purpose of his visit? What did he say to you?

Mr. Cooke: Objected to as irrelevant and immaterial [497] what he said.

The Court: Objection overruled. You may answer the question.

A. He came to tell me about his credentials, that he was associated with building of large hotels, the Skeens Hotel, and was starting back in business again and very anxious to sell himself to me as far as being able to erect a building, to give us satisfaction.

Q. Did you at any time after that discuss his qualifications with Mr. Denson? A. No.

Q. Well, you made an effort to find out about his qualifications?

A. No, I am sorry I didn't.

Q. You didn't?

A. No. I might say that I was impressed with Mr. Moorehead. He seemed to be very nice and understanding.

(Testimony of Mrs. Charles W. Mapes.)

Q. Did Mr. Denson at any time, in conversation with you before you met Mr. Moorehead, mention Mr. Moorehead to you?

A. Not that I recall, Mr. Platt.

Q. Well, are you positive that he didn't?

Mr. Cooke: I renew my objection, your Honor.

The Court: Objection overruled.

A. I don't recall, Mr. Platt.

Q. He may have done so but you don't recall?

A. No, I don't.

Q. When, if at all, did you see Mr. Moorehead again?

A. He had called me and he wrote me. He seemed to keep after me quite a little after that first visit. I don't know as I paid very much attention to his visits or calls.

Q. You didn't pay much attention?

A. No, I don't believe I became interested in Mr. Moorehead until 1945. He had been to see me and called me and sent me letters.

Q. How did you become interested in him in 1945?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Q. How many times, do you recall, Mrs. Mapes, that you met Mr. Denson before he signed the agreement on October 4, 1945?

Mr. Cooke: Same objection. Preliminary negotiations merged in the written agreement.

(Testimony of Mrs. Charles W. Mapes.)

The Court: Objection overruled. Answer the question.

A. I couldn't tell you just exactly how many times.

Q. Well, quite a number of times, wasn't it?

A. No, I think that would be several times. I couldn't exactly tell you.

Q. Well, it was several times, wasn't it?

A. Oh, two or three. I wouldn't know really. I haven't it in my mind.

Q. Prior to the signing of the contract did you entertain Mr. [499] Denson at your home?

A. Yes.

Q. Upon many occasions?

A. No, I wouldn't say many. I think possibly two or three times. I don't know whether that was prior or after. It might have been once or twice before.

Q. And upon those occasions prior were Charles and Gloria Present? A. Yes.

Q. As a matter of fact, he was a house guest at your home, wasn't he, at times before he signed the contract?

A. Once before or twice before—twice before.

Q. You were on very friendly terms with him, weren't you? A. Why, of course.

Q. And then after he came up here on October 4th and signed the agreement, when did you see him again?

A. Well, I wouldn't know just exactly. Right

(Testimony of Mrs. Charles W. Mapes.)

after that. I think it was in November or the latter part of October.

Q. Of 1945? A. '45.

Q. And where did you meet him then?

A. Here in Reno.

Q. At what place?

A. Well, it would be my home.

Q. You are not certain whether it was October or November? [500]

A. No, not definite, no.

Q. And who was present with Mr. Denson at your home when you met him either in October or November of '45?

A. Why my daughter Gloria, I guess that's about all. I don't know whether Charles was there or not.

Q. Was he a house guest upon that occasion?

A. Yes, he was.

Q. Stayed at your home over the week-end?

A. Well, he stayed twice at my home.

Q. And you entertained him?

A. Yes, always.

Q. And I suppose he in turn entertained you to some extent?

A. I wouldn't say. No, I don't think he did, Mr. Platt.

Q. But you entertained him on these occasions?

A. Yes.

Q. On that occasion in October or November do you think he was here two or three days?

A. Yes, I would say he was.

(Testimony of Mrs. Charles W. Mapes.)

Q. Did you talk about the hotel building upon which he had this contract?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: Objection overruled. You may answer the question, Mrs. Mapes. Do you understand the question?

A. Yes, that I had talked to him about the hotel. Yes, we [501] were considering signing, to start the construction of the hotel at that time.

Q. Well, what did you discuss with him at that time?

A. I think I asked him any time when he did come could we get together on an agreement as far as association, so that we could get together on the lease. That was right after October 4th. I don't think Mr. Denson came back until—it was the latter part of October or November that he came back and at that time I asked him if we couldn't get together on an agreement for the association, that we could draw up a lease. Mr. Denson, I recall, was there in my home at the time. He wasn't well. He was having trouble with his denture, his mouth was giving him quite a little bit of trouble, but just the exact date I couldn't tell you at all, and he left. He was sort of a sick man, I would say, having this difficulty with his denture and mouth bothering him. He couldn't eat, was having difficulty and he was going down to see a doctor.

Q. But you don't recall whether that conversation was in October or November? A. No.

(Testimony of Mrs. Charles W. Mapes.)

Q. Might it have been in December?

A. No, it would be earlier than that. It was in October or November.

Q. When did you see Mr. Denson again?

A. I talked to him on the telephone later in November when we [502] had actually started work on the building over there.

Q. You talked to him on the telephone?

A. On the telephone.

Q. Where was he and where were you when you talked?

A. He was in Visalia. I was in my home.

Q. And what part of November was that?

A. The latter part.

Q. Did he call you upon that occasion or did you call him? A. I called him.

Q. What did you call him about? What did you say?

A. Well, he had been informed that actual construction of the job had started, the superintendent was on the job and actual construction had started, such as building the protection to the public, etc., like that, and I called him and asked him if he could come up so we could get together on this agreement so that we could draw up a lease.

Q. What did he say?

A. Well, he was busy at that time, selling his hotel, and he said he would come.

Q. Selling his hotel? A. Yes.

Q. Did you know that he sold his hotel?

A. Yes.

(Testimony of Mrs. Charles W. Mapes.)

Q. Did he tell you why?

A. Well, when he first came to see me, the very first time, [503] he told me he was contemplating selling the hotel. This was a seller's market and he wanted to sell his lease.

Q. Didn't he tell you he was selling his hotel because he wanted to devote all his time to your hotel?

A. No.

Q. You say he didn't say that?

A. No. He wanted to get rid of the lease he had on the Johnson Hotel, I believe it was, in Visalia; this was a seller's market and he wanted to get out of there and then all of a sudden he wrote me a letter—he told me he had somebody interested in buying the hotel and that was in, I would say, November.

Q. When did you see him again?

A. Not until January of 1946.

Q. Where did you see him at that time?

A. Here in Reno.

Q. At what place?

A. At my home. He was here for three days, I believe.

Q. Was he a guest at your home? A. No.

Q. How many times did you see him during those three days?

A. Well, the two days he was here, I saw him for two days and—I want to say for two days I saw him.

Q. And you entertained him as usual at your home?

(Testimony of Mrs. Charles W. Mapes.)

A. Well, I think we were quite busy right at that time. I [504] don't know as we entertained him, might have had him for dinner. I might say I am quite hospitable, Mr. Platt, so far as entertaining and I might have asked him to dinner.

Q. I know that. At any rate, your relations with him at that time were very cordial, weren't they?

A. Yes. And I told him at this visit that we had started the building, the permit had been taken out, and asked him couldn't we get together with an agreement so that we could draw up a lease and he told me he had to leave to go to his home in Visalia and he would come back. He was right here when I got the permit and the building was actually started and he promised to come back.

Q. And you say that was in January, 1946?

A. That was in January, yes.

Q. Were you present in Mr. Cooke's office when Mr. Denson signed the agreement?

A. What agreement, this 24th of September?

Q. Yes. A. Yes.

Q. When he signed it on October 4th?

A. Yes.

Q. Didn't Mr. Denson say that he would tell you and Mr. Cooke that he would sign a lease any time it was prepared? A. No.

Q. You state he didn't make such a statement?

A. No, Mr. Platt.

Q. Now you saw him the last time early in January, '46, I mean the last time you testified about?

(Testimony of Mrs. Charles W. Mapes.)

A. I saw him around the 25th of January.

Q. The 25th?

A. 24th, 25th and 26th of January, yes.

Q. When did you see him again?

A. I didn't see him again until April 10th.

Q. And where did you see him then?

A. In my home.

Q. Did you meet Mr. Denson in San Francisco at any time? A. Yes.

Q. And what were those occasions?

A. I met Mr. Denson, as I recall, twice in San Francisco. The first time was—well, I met him V-J night and the day after V-J.

Q. What date was that?

A. I would say that was August 14th and 15th. I am not definite on that date, but I will never forget the day, V-J Day.

Q. Where did you meet him on that occasion?

A. You mean the very first time?

Q. Well, the first time?

A. I met him that evening in the lobby at the hotel. I think he came to our room later, I know he did.

Q. How did you happen to meet him on that occasion, on V-J [506] Day?

A. Mr. Moorehead had been to look over these plans he had drawn up and he wanted to come to Reno and I told him we had business in San Francisco and to save him a trip we would go to San Francisco and he arranged this meeting and I believe that was the day after V-J Day.

(Testimony of Mrs. Charles W. Mapes.)

Q. Didn't he arrange the meeting with Mr. Denson?

A. Mr. Denson would be there.

Q. And he told you Mr. Denson would be there?

A. Yes.

Q. And Mr. Denson was there?

A. Mr. Denson and Mr. Denson's wife, I believe, were there on a vacation.

Q. And at what hotel did you meet?

A. That was the Sir Francis Drake.

Q. What part of the hotel did you meet?

A. It was up on the Mezzanine floor. What meeting is this? Am I getting ahead of myself?

Q. V-J Day.

A. No, we arrived in Oakland just as V-J Day was declared. We came over to the hotel and were greeted with a bucket of water from the window. The whole town was in excitement, and I met Mr. Denson in the lobby that evening and later he joined us in our room. My son was there and Mrs. Denson. That was the first time I had ever met Mrs. Denson, and my [507] daughter Gloria.

Q. Well, did Mr. Denson participate in the discussion about the plans, if there was any?

A. Well, I don't recall that he did, anything special.

Q. Did you? A. Yes.

Q. What did you say about the plans?

A. Well, I remember remarking the plans weren't to my expectations. They weren't what I planned or thought of.

(Testimony of Mrs. Charles W. Mapes.)

Q. Did Mr. Denson make any suggestion about the plans?

A. I don't recall any definite. I think we all talked and chatted, but I don't know as he gave anything definite.

Q. Well, he may have made some but you don't remember?

A. No, I wouldn't say at that time. I think they were showing me plans, Mr. Platt.

Q. And you saw him again in San Francisco, didn't you?

A. Yes, I would say about two weeks later.

Q. Where did you meet then?

A. In the Fielding Hotel.

Q. And did you meet by appointment?

A. Yes, there was an appointment.

Q. Who arranged the appointment?

A. Well, that was with Mr. Moorehead.

Q. Was it understood that Mr. Denson——

A. (Interrupting): It was a continued meeting from that first [508] meeting.

Q. Did you understand that Mr. Denson would be present?

A. Mr. Denson said that he would be there.

Q. Who participated in that conference?

A. Well, Mr. Denson, Mr. Slocum, Mr. Moorehead, my son Charles and myself.

Q. And that occurred at the Fielding Hotel?

A. At the Fielding Hotel.

Q. How long were you in conference?

A. Well, we met in the forenoon, had lunch and

(Testimony of Mrs. Charles W. Mapes.)

came back later in the afternoon and talked a little bit.

Q. Were any plans exhibited at that time?

A. They were corrected plans from that first visit at the Sir Francis Drake by Mr. Moorehead.

Q. Were any suggestions given, plans, made by Mr. Denson?

Mr. Cooke: We wish at this time to renew our objection, your Honor, for fear it will be forgotten; that this evidence is irrelevant and immaterial, has nothing to do with things done and said prior to the recital of the document in question.

The Court: Objection overruled.

A. Not that I recall, Mr. Platt.

Q. Do you recall any suggestions Mr. Denson made concerning plans of the hotel?

A. Not definite. [509]

Q. Definitely or indefinitely, have you any recollection? A. No, I don't recall.

Q. Do you recall he made a suggestion about enlarging the rooms? A. No.

Q. Do you recall that he ever made a suggestion about enlarging the size of the sky room?

A. No.

Q. Cutting out the indenture and making it straight across? A. No.

Q. Do you recall any suggestions he made with respect to enlarging the closets in the hotel?

A. Coming directly from Mr. Denson?

Q. I am asking you whether you recall any suggestions?

(Testimony of Mrs. Charles W. Mapes.)

A. No, he didn't make any suggestions.

Q. Do you recall whether he made any suggestions with respect to the third elevator in the hotel?

A. No.

Q. Do you recall a single suggestion he made?

A. No, it doesn't stand out in my mind, a single suggestion.

Q. Not a single suggestion?

A. Not a single suggestion. May I say at this time——

Q. (Interrupting): There were many changes, weren't there, made in the plan?

A. Well, the idea of the hotel is purely my own, the thought [510] of the sky room and side walls continued, is my own. I corrected Mr. Moorehead many times on the plans he presented, and how the rooms became larger, Mr. Moorehead gave me the plans of the hotel, single rooms, giving these windows on the outside. I said, "Mr. Moorehead, this would never do. These have to be double windows." At that time it was suggested the rooms be enlarged. I had called his attention from the very start my thought was large rooms and as large closet space as we could have and he couldn't give me large rooms on account of the way he spaced the windows and I didn't know about that until after he presented the outside view of the hotel and this was a single window and I said, "We can't have this, it has to be a double window." He said well at that he could enlarge the rooms and that is how it was the rooms became enlarged.

(Testimony of Mrs. Charles W. Mapes.)

Q. But you are definite in your statement that no suggestion ever came from Mr. Denson as to change in plans of the hotel?

A. I am definite in that.

Q. And if Mr. Moorehead, your construction engineer, gave such testimony he was in error?

A. I don't know about that.

Mr. Cooke: Objected to. This witness——

The Court (Interrupting): Objection sustained. It may be stricken if already answered. [511]

Q. Did Mr. Moorehead ever tell you that Mr. Denson suggested changes?

A. I had heard Mr. Moorehead and Mr. Slo-cum——,

Q. Can't you answer that question?

A. I don't recall that he did tell me about anything definitely being changed, no.

Q. Do you mean by that answer that he did not or he might have and you have forgotten about it? Which is your answer?

A. I don't recall that he ever gave me any definite change that Mr. Denson had made. I might have mentioned a change and they might have taken it up as their change, but it was my original idea. I hired Mr. Denson and Mr. Moorehead as competent people to correct any changes that were not right in my ideas and we argued back and forth. I was very definite what I wanted in that hotel.

Q. You say you hired Mr. Denson and Mr. Moorehead?

(Testimony of Mrs. Charles W. Mapes.)

A. I am sorry. May I excuse that. I mean Mr. Moorehead.

Q. I am repeating the question.

A. I mean the engineer and architect. They were hired to assist me in putting correctly my ideas into that building. I am paying for the building and building the building.

Q. As a matter of fact, Mrs. Mapes, isn't it a fact that you relied in many instances on Mr. Denson's advice and counsel and his long experience with hotels?

A. No. [512]

Q. You didn't rely on him at all?

A. No.

Q. Why, may I ask, did you want Mr. Denson present at all these conferences you held with the builder and architect?

Mr. Cooke: That is objected to. I don't know if there is any testimony she said she wanted him.

The Court: Objection overruled.

(Question read.)

A. I don't know that I wanted him present. I think he was just there present. I think he was welcome and knew what was going on, but I don't think he was sent for specially to be there.

Q. Mrs. Mapes, didn't you testify a while ago that it was your desire to have Mr. Denson present and that is why you had him meet you and Mr. Moorehead and Mr. Slocum in San Francisco?

A. It was understood—I didn't testify I wanted him there. It was understood he would be present.

(Testimony of Mrs. Charles W. Mapes.)

If I testified like that, I would like to correct it at this time.

Q. Did you understand he was going to be present?
A. Yes.

Q. What led you to that understanding?

A. Mr. Moorehead.

Q. What did Mr. Moorehead tell you?

Mr. Cooke: Objected to as irrelevant and immaterial. [513] There must be some limit to this.

The Court: Objection overruled.

A. Mr. Moorehead told—Mr. Moorehead had called me and said he had plans ready and would like to bring them up to see how I would approve them and I told him it wouldn't be necessary for him to bring them to me, that I had business I had to do in San Francisco and it was Mr. Moorehead that arranged with Mr. Denson to be there. I didn't arrange with Mr. Denson to be there. I understood he was going to be there.

Q. You understood he was going to be there?

A. Through Mr. Moorehead. I didn't request his being there.

Q. What did Mr. Moorehead tell you that you had that understanding that Mr. Denson would be there?

Mr. Cooke: We renew the objection.

The Court: Objection overruled.

A. Well, Mr. Moorehead and Mr. Denson had kept after me ever since I had known either one of them about this hotel. They were together in a lot of conversations that I wouldn't know anything about.

(Testimony of Mrs. Charles W. Mapes.)

Q. But Mr. Denson was actually present on these occasions in San Francisco with your approval? A. Yes.

Q. And he entered into the conversation?

A. Yes.

Q. And he entered into the discussion as to ways and means of [514] constructing the hotel and changes and plans? A. No, no.

Q. He didn't?

A. No, those were my ideas and Mr. Moorehead's and Mr. Slocum's.

Q. Do you mean to say that Mr. Denson didn't discuss at all with you or with Mr. Moorehead and with Mr. Slocum at these two conferences that you held in San Francisco, do you mean to say that he didn't enter into the discussion?

A. He might, yes, in some trivial way that doesn't stand out in my mind, but I wouldn't recall that.

Q. In some trivial way?

A. Something that wouldn't stand out. I was there for Mr. Moorehead to try to sell me his plans to see if he would be the one responsible for erecting the building. I was there to be pleased, not Mr. Denson.

Q. As I understand it, Mr. Denson's discussion was so limited in scope and so trivial that it didn't impress you at all?

A. It didn't impress me.

Q. And that was true, was it, upon every con-

(Testimony of Mrs. Charles W. Mapes.)
ference you had with him in the presence of Mr. Moorehead and Mr. Slocum?

A. As far as I can recall, yes.

Q. And were his discussions with you in Reno just as trivial?

A. I think I told him what had been going on, but I don't think he informed me of any changes. I know he didn't. [515]

Q. In other words, he had very little to say about the hotel?

A. About the construction of the hotel. I was constructing it.

Q. And that is your testimony with respect to all interviews about the hotel in which you and he participated? A. Yes.

The Court: We will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:50 p.m.) [516]

Wednesday, December 11, 1946

10:00 A.M.

Appearances same as at previous sessions.

Mr. Platt: If the Court please, pursuant to our request yesterday, Mr. Cooke has just furnished me with a copy of the co-partnership agreement entered into between Mrs. Charles W. Mapes, Charles W. Mapes, Jr., and Gloria M. Mapes on November 9, 1943, and while this is a copy, I don't suppose Mr. Cooke will make a point of that, but I offer it in evidence as the original co-partnership agreement.

Mr. Cooke: No, I won't make any point of that; I told you it was a copy, but I wish to add an objection.

The Court: Do you desire to make your objection now, Mr. Cooke?

Mr. Cooke: Yes. The objection is that it is immaterial, incompetent, and irrelevant for the purpose that it is presumably offered, namely, to show notice to Gloria Mapes of the unrecorded Denson agreement of September 24, 1945, the point of the objection being this, your Honor, that it would not impute notice to Gloria Mapes, she being a purchaser on the face of the deed for one-third interest in this particular property. It wouldn't include notice to her because of the fact that Mrs. Mapes, who did, of course, have notice of it and who was the grantor, her knowledge wouldn't impute to the purchaser for a valuable consideration, even though they may be partners. This was not a partnership transaction, this [517] was not a part of the partnership business, carrying forward the joint partnership affairs, but it was a purchase by two of the partners of certain property from the third partner, for the purpose of making it a joint ownership proposition. Now the authorities, as I find them on that point, are generally to this effect, that if it might be presumed that the grantor, knowing the existence, would inform the grantee of any outstanding unrecorded equities, such as we have here, that would be imputed where partnership relation existed and transaction is between one partner and another part-

ner, but unless your Honor can find or thought, according to the legal relations existing between the parties at the time, Mrs. Mapes would have necessarily have informed the grantees that, "Here is an outstanding agreement I have here with a man named Denson and it involves a contemplated lease for 20 years and if this thing goes through there will be a lease on this property for 20 years' time, so I want you to know this when you buy this property and pay the money for it," if that were the situation, your Honor, then that notice to the grantor under the circumstances would be notice to the grantee, but there is nothing of that kind here, I submit. The matter of whether this constituted an encumbrance upon the interest might deter the deal being made. If you just forget for a moment the relationship of the parties, mother and daughter and son, and take the case of Smith and Brown and Thompson and Smith has a [518] proposition to sell to his other two partners, we will say, a certain piece of property. They are to buy a two-thirds interest in it and if Smith, the grantor, knows that John Brown or Pete Denson or somebody has a claim on that property that might possibly be enforced and if enforced it might perhaps bear upon the value of the property, so Mr. Smith doesn't tell the other party anything about it. It is not of record and they buy that without any notice at all. There, of course, it could not be claimed there would be any imputed knowledge, even though the relationship exists. Because the grantor had the notice is no rea-

son that the grantor, under those circumstances, would not be supposed to be under any duty to tell the grantees that there was this outstanding lien. That is the basis of my objection.

Mr. Platt: I repeat, if the Court please, what I stated yesterday. Of course Mrs. Mapes testified, if I understand her testimony correctly, the children had an equal interest with her in the estate of her deceased husband. That being so, it must be construed that they all had an equal interest in the real estate that is involved in this litigation and this co-partnership which was entered into in 1943 is quite a sweeping co-partnership. It provides that the parties hereto have agreed, and by these presents do agree, to associate themselves as co-partners for the purpose of carrying on the business of buying, selling, conveying, leasing and generally [519] operating real estate in Reno, Washoe County, Nevada, and to do and transact such other business that might appertain thereto that the parties shall decide to engage upon; that the name and style of such co-partnership shall be Chas. W. Mapes Company and shall continue until dissolved or terminated according to law; the parties hereto have each furnished in cash, or its equivalent, an undivided one-third of the value of the entire property belonging to the co-partners; that at all times during the continuation of said co-partnership each of the parties will give their best interest * * * and each will bear, pay and discharge equally between them all expenses required for the support and management

of said business, and so on. Certainly under such a co-partnership agreement, involving the ownership and possession and right of possession of real estate and real estate involved in this transaction, if one of those partners enters into an agreement for leasing of any part or portion of that real estate or the disposition of it, certainly it binds the remaining parties and notice is imputed to them with respect to the transaction. It would likewise be if either one of the parties had entered into an agreement for the leasing of any part or portion of the property as a part of the partnership business. Certainly it is fundamental that one partner entering into a contract like that binds the others.

Mr. Cooke: If the Court please, one thing I think [520] counsel overlooked and that is that the deed from Mrs. Mapes to Gloria and Charles of this particular property was not made until November 6th of 1945. The partnership agreement had to do with the property that belonged at that time, but the partnership did not own the property at that time. It was owned by Mrs. Mapes individually down to November 6, 1945, or two years thereafter. I think Mrs. Mapes did make sort of a general statement on the stand yesterday that the property of the estate was divided, but this was not property of the estate. This particular lot never did go into the estate and counsel put in a deed from Mrs. Mapes individually to Gloria and Charles, dated in November, which would show that that property

belonged to her. The estate had nothing to do with that, until November 6, 1945, so it is not an action, as counsel seemed to assume, of one partner going out after the partnership was formed and entering into a contract and agreement. I would freely grant if after November 6, 1945, Mrs. Mapes had gone out and made a deal with Mr. Denson or anybody else personally, being a partner, that would be binding on the partnership. But she was the sole owner when this transaction was made on September 24, 1945, and hence I say before Gloria can be held under this alleged unrecorded instrument which existed between Mrs. Mapes and Mr. Denson, they have to show that she had constructive notice or imputed notice, which is the same thing. They have not offered to show any [521] evidence that she had actual knowledge of it. Now they seek to show that she has imputed knowledge by reason of the grantor, Mrs. Mapes' knowledge and what I say is well founded in law, that notice of a grantor, under those circumstances, even though a partner, would not be notice to the grantee.

The Court: Your objection might go more to the weight than the question of admissibility of the particular instrument now offered. The objection will be overruled and the partnership agreement may be admitted in evidence as Plaintiff's Exhibit "O."

Mr. Platt: I have read most of it into the record and I will let it stand that way, your Honor.

MRS. MAPES

resumed the witness stand.

Further Examination

By Mr. Platt:

Q. Mrs. Mapes, on yesterday I understood you to testify that the only time you signed an agreement bearing date 24th of September, 1945, was on October 4, 1945, when Mr. Denson appeared here in Mr. Cooke's office, is that true? A. Yes.

Q. In order to refresh your recollection about that, I call your attention to what purports to be an agreement entered into this 24th day of September, 1945, upon the stationery of H. R. Cooke, attorney, phone 6333, which purportedly bears [522] your signature alone and witnessed purportedly by B. C. Yparraguire and H. R. Cooke. Now didn't you sign that agreement personally in Mr. Cooke's office on the 24th of September, 1945?

Mr. Cooke: Objected to as irrelevant and immaterial.

Q. Wasn't it understood that Mr. Cooke was to send that signed agreement by you to Mr. Denson at the Biltmore Hotel, Los Angeles, California?

Mr. Cooke: Objected to as compound. You are asking two questions in one.

The Court: Objection will be overruled.

Mr. Cooke: May I add to that objection?

The Court: Certainly. Ruling is withdrawn.

Mr. Cooke: The objection that I heretofore made, that this in the event is a document that is

(Testimony of Mrs. Irene Gladys Mapes.)

purportedly held to be signed by Mrs. Mapes alone, it is irrelevant as to document admittedly signed by all parties, to wit, September 24, 1945, and whatever papers may have been signed or partially signed or partially executed or what not would be part of the rule not being the best evidence and being part of the negotiations they are deemed to be merged in the agreement that was finally signed up by all the parties.

The Court: Objection will be overruled.

(Question read.)

A. Mr. Platt, is this the same that we initialed?

Q. No.

A. The copy I signed was the same as I have in my pocketbook here.

Q. Let me ask you, Mrs. Mapes, is that your signature on this agreement? A. Yes.

Q. Do you know Mr. Cooke's signature?

A. Yes.

Q. Is that his signature? A. Yes.

Q. Do you know Miss Yparraguire's signature? She is Mr. Cooke's secretary. A. Yes.

Q. Is that her signature? A. Yes.

Q. You identify all those signatures?

A. Yes.

Mr. Platt: We offer it in evidence, your Honor.

Mr. Cooke: We object to the document being admitted in evidence on all the grounds stated in the last objection to the question, and the further ground that there is no foundation for showing that

(Testimony of Mrs. Irene Gladys Mapes.)

it was ever delivered to anybody, where it came from, whether it was picked up on the street or how it was obtained or whether it was passed to the plaintiff in this case, whether it even constitutes or referred to the [524] dictum of preliminary negotiations. The paper apparently bears signature of Mrs. Mapes, but does not bear signature of the other parties. It bears the signature of the witness, that is true, but I submit it is immaterial, irrelevant, does not constitute legal evidence for any purpose at all.

The Court: So far I do not believe there has been any showing that this particular offer, this exhibit now offered, came to the notice of the plaintiff.

Mr. Platt: That is right, your Honor.

The Court: So you might just mark it for identification at this time.

Mr. Platt: But in that connection we desire to prove, and offer to prove, that that document which I have offered in evidence was enclosed in an envelope in Mr. Cooke's office and sent by Mr. Cooke on September 24th to Mr. P. G. Denson, care of Biltmore Hotel, Los Angeles, California. The envelope bears the receiving date or receiving postmark, the envelope bears the inscription, "H. R. Cooke, Attorney and Counsellor at Law, First National Bank, Reno, Nevada." We offer to prove that, but if Mr. Cooke continues to stand upon his professional privilege, we can't prove it except through Mr. Denson and he has already testified that he received it.

The Court: Well at the time Mr. Denson was on

(Testimony of Mrs. Irene Gladys Mapes.)

the stand was this particular document called to his attention?

Mr. Platt: No, your Honor, it wasn't called to his attention except generally.

The Court: The Court will permit you to offer proof by Mr. Denson or otherwise of the fact that this particular document did or did not come to his attention and received by him, so at the present time the objection to the introduction of the instrument will be sustained.

Mr. Platt: May we offer the exhibit for identification?

The Court: It will be marked for identification as Plaintiff's Exhibit "P".

Mr. Platt: In order that the record may be now straight, may I offer in addition to it the envelope?

The Court: That will be offered as part of the same exhibit, marked as the same exhibit, Exhibit "P" for identification.

Q. Mrs. Mapes, did you at any time discuss the question of a loan with Mr. Denson, for the purpose of borrowing money to aid in the construction of the hotel?

A. No, that is outright. I might have discussed that I was getting a loan.

Q. That you were what? [526]

A. That I was contemplating getting a loan. I don't recall that, but not in the sense Mr. Denson has said here in court, that he helped me to get it.

Q. Well, did you have any conversation with Mr. Denson at any time or at any place, wherein you

(Testimony of Mrs. Irene Gladys Mapes.)

expressed the desire to get a loan and asked his assistance in obtaining one?

A. No, I asked Mr. Moorehead——

Mr. Cooke: (Interrupting) The question can be answered yes or no I think.

A. No.

Q. Well, did you send any representative or agent or embassy to Mr. Denson with a request that he communicate your desire that Mr. Denson assist you in obtaining such a loan.

A. No, I did not.

Q. Did you ever discuss the question of a loan with Mr. Denson in company with Mr. Moorehead?

A. I believe I did. I told Mr. Moorehead I was going to Sacramento to see Mr. Wright and asked whether or not if he would go along and explain the construction of the building and he said he would gladly do it and Mr. Moorehead and I went to Sacramento to the California State Life Insurance Company, Mr. Wright, and we discussed the loan and Mr. Wright said—he had been in my home, I knew Mr. Wright—and he said he was interested in the loan but their company was limited to the amount of money they could loan and that they would have to call in the Occidental Life.

Q. Was Mr. Denson present in Sacramento?

A. No, he wasn't present in Sacramento. No, this was just between Mr. Moorehead and myself. I don't know whether he heard any conversation at the time or not, but this was directed to Mr. Moorehead.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. But did Mr. Denson later meet with you and Mr. Moorehead?

A. No, I understood through Mr. Moorehead——

Q. (Interrupting) Just a minute. I want to get the question finished.

A. I am sorry.

Q. Did Mr. Denson meet with you and Mr. Moorehead at any time in Sacramento or in San Francisco for a discussion of the loan?

Mr. Cooke: Objected to on the ground that this is not a preliminary negotiation, that it is not part of any contract that your Honor is authorized to decree specific performances, being nothing in the written document with reference to any loan transaction or that Mr. Denson should have anything to do with it; that under the amendment to the complaint, whereas it is originally alleged he secured a loan, it was changed to the allegation that he attempted to secure a loan or assisting in securing a loan. Your Honor will recall the amendment to the amended complaint. The whole matter of whether he undertook to attempt to help her get a loan, to our mind at least, with due respect to those that differ from us, is fugitive and utterly beyond the jurisdiction of the court. It is not a part [528] of contract. It is not a part of any written document. Under law there has to be a writing and has to be certain and definite in all essential material provisions and that he attempted to get a loan does not have anything to do with this any more than if he attempted to cross a bridge. It is so far removed

(Testimony of Mrs. Irene Gladys Mapes.)

—we are absolutely serious in our stand—but we are going far afield by taking in all these matters of oral talk and attempts to do this, that and the other as constituting any part of the contract or having anything to do with the contract or having any sort of connection, even remotest, with the contract that your Honor is called upon to determine whether it can specifically be enforced or not.

The Court: Objection overruled. You may answer the question.

A. I don't recall that he ever did, no.

Q. Isn't a fact, Mrs. Mapes, that you know, of your own knowledge, that Mr. Denson contacted a Mr. Gock, who was vice-president of the Bank of America, in an effort to obtain the loan for you?

Mr. Cooke: I wish to interpose the same objection, your Honor, and more specifically the objection that this admittedly occurred, if it occurred at all, prior to the signing of the document which is the basis of plaintiff's case and that the evidence can not control or neutralize or change or effect the meaning of that document. That it isn't claimed that [529] the document is uncertain upon its face, that it is ambiguous in the sense it requires oral testimony of preliminary negotiations to explain it. It is claimed it was executed by everybody, so it must be allowed to speak for itself, without regard to what was said or done prior to that.

The Court: Objection overruled. Answer the question.

(Testimony of Mrs. Irene Gladys Mapes.)

A. I can't recall that he talked to me about Mr. Gock in regard to the loan.

Q. Did Mr. Denson talk to you about Mr. Gock about anything?

A. Yes.

Q. About what?

A. About helping me secure the 12-foot strip.

Q. When did that conversation take place?

Mr. Cooke: Same objection I have made all through.

The Court: It may apply to all this class and character of testimony and same ruling will also apply.

A. As far as I can recall, I believe it was in December.

Q. December? A. Yes.

The Court: What year was that?

A. That would be '45.

Q. Do you remember what time in December this conversation took place?

A. I am really sorry, I couldn't know. I think there is a definite way for me to find out though if [530] that is necessary.

Q. Where did it take place?

A. Mr. Denson——

Q. (Interrupting) Can't you answer that question?

A. Where did it take place?

Q. Yes.

A. What are you talking about now?

(Testimony of Mrs. Irene Gladys Mapes.)

Q. The conversation I understood you had with Mr. Denson concerning the 12-foot strip, during which conversation Mr. Gock's name was mentioned. Where did that conversation take place?

A. I think that conversation came before the signing of that agreement in September.

Mr. Cooke: You have already stated that it was in December, you thought, of '45.

A. Well, I think I have Mr. Gock's letter. I think I asked Mr. Denson to see Mr. Gock about this 12-foot strip. I understood there was an objection to it, the bank being adjoining property owners, and that was what was keeping us from being able to purchase that 12-foot strip.

Q. Well, when did you first learn that there was such a man as Mr. Gock in existence?

A. Mr. Denson spoke of Mr. Gock as being one of the heads of the Bank of America.

Q. Did he tell you where he lived? [531]

A. He lived in Los Angeles.

Q. Your testimony is that you wanted the assistance of Mr. Gock, who lives in Los Angeles, isn't a residence of Reno or Nevada, in obtaining or assisting in obtaining the 12-foot additional strip?

A. No, I think Mr. Denson asked me about the 12-foot strip and I told him I was having objections from the bank. I understood the objection had come from the bank. He said, "Would a letter from Mr. Gock help in any way to have Mr. Hopper intercede for the 12-foot strip for you?" I said, I think

(Testimony of Mrs. Irene Gladys Mapes.)

it would go a great way." They are adjoining property owners and objected to that 12-foot strip.

Q. Was Mr. Denson in Reno during the month of December, 1945?

A. No, and I would like at this time to correct what I stated yesterday. It wasn't in December or October and November as stated yesterday. I was mistaken.

Q. Do you know whether Mr. Denson ever interviewed Mr. Hopper of the bank here concerning the 12-foot strip. A. Yes.

Q. When did he do that?

Mr. Cooke: Objected to as irrelevant and immaterial; outside of any possible issues in the case, as part of this proposed loan they say he attempted to get for us. I understand that this evidence, and all along this line, has gone in pursuant to the allegation of the amendment to the amended complaint [532] that he attempted to get a loan for us, but talk to Mr. Hopper and what was said between Mr. Hopper and him about the 12-foot strip, seems to me to be outside the allegations and outside the issues of the case. I add all the other objections I have made.

The Court: What is your purpose of going into this matter of the 12-foot strip?

Mr. Platt: Well, if your Honor please, I desire to show that Mr. Denson, through the suggestions of Mrs. Mapes, did intercede in order to assist her in getting this 12-foot strip, but he interceded through Mr. Hopper and Mr. Gock's name was

(Testimony of Mrs. Irene Gladys Mapes.)

not mentioned in the transaction at all. It is a question as to the credibility of her testimony.

The Court: It bears on the question of negotiations in regard to the loan?

Mr. Platt: Yes.

The Court: Objection overruled. Answer the question.

(Question read.)

A. Mr. Denson didn't interview Mr. Hopper. He went along with me to see Mr. Hopper and that was some time in September. It was before this agreement was signed.

Q. He went along with you to see Mr. Hopper?

A. Yes, he was here in Reno.

Q. Well, you discussed the question of the 12-foot strip at [533] that time?

A. Yes, I went up and discussed the 12-foot strip with Mr. Hopper.

Q. Was there any mention made at that time of Mr. Gock? A. No.

Q. You are certain about that?

A. Mr. Denson might have said he knew Mr. Gock, but he wasn't brought into the conversation. I think Mr. Denson was always informing me he knew Mr. Gock. Mr. Gock and he were very inseparable friends. That was brought out many times during the conversation.

Q. Well, did Mr. Denson ever tell you in any conversation that he had with you why he would repeatedly mention the name of Mr. Gock?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I think he told me one time that he helped Mr. Gock or Mr. Giannini to get stock or something. I didn't get the connection at all that he mentioned.

Q. Isn't it a fact, Mrs. Mapes, when you were discussing the question of a loan that Mr. Denson told you that he had a very influential friend by the name of Mr. Gock, who was a friend of his and was connected with the Bank of America in a high official position and that he thought that if he interceded for a loan on your behalf he would get it? Now didn't Mr. Denson tell you that?

A. No, he didn't tell me that. [534]

Q. As a matter of fact, Mrs. Mapes, didn't Mr. Denson tell you here in Reno that he felt quite certain that through the interposition of Mr. Gock that he would succeed in obtaining a loan for you?

A. No, he did not.

Q. Do you know how Mr. Denson happened to be in Sacramento when you and Mr. Moorehead were there attempting to get the loan?

A. I really don't recall Mr. Denson in Sacramento, I am sorry to tell you that.

Q. He then wasn't there?

A. I don't recall him being there.

Q. It has been suggested, Mrs. Mapes, that I ask you this question. During any of your negotiations leading up to the signing of this agreement in evidence here, did you ever discuss with

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Denson the necessity of your needing money and the necessity of obtaining a loan?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. No, I didn't, Mr. Platt. You can always get money as far as your credit is good and I don't thing I had to look to Mr. Denson to help me get a loan. I think I asked Mr. Moorehead—

Q. (Interrupting) Then your answer is that you never discussed with Mr. Denson the question of financing this hotel building operation? [535]

A. No.

Q. Never once?

A. No. Well, I can't recall never once. I might have spoken after we had gone into the negotiations, I don't recall that, about the loan, but I wasn't looking to Mr. Denson at any time to help me to get a loan. I think our background would get me any amount I would need, our financial statement, and I think it is ridiculous to think that he could get me a loan. I asked Mr. Moorehead to assist me for his being able to tell what the building was that was being constructed and how much it would cost and about how long it would take to construct it, but I think our background would warrant any loan, Mr. Platt, and I would like to put that in very definitely; it wouldn't be Mr. Denson that would have to help me get a loan.

Q. Did I understand you to say that you asked Mr. Moorehead to assist you?

A. To go along and describe the building, to give

(Testimony of Mrs. Irene Gladys Mapes.)

an idea of what we were trying to construct in the building. I knew Mr. Wright and he knew me, a friend of the family. He had been in our home and we got in to Mr. Wright and Mr. Wright got us into the Occidental Life. I don't think I ever needed Mr. Denson at any time to help me get a loan. My financial statement would warrant any loan that I would ask for.

Q. And in order thoroughly to understand your testimony, you [536] said that Mr. Gock's name was never brought into any conversation that you had with Mr. Denson except with reference to the 12-foot strip? A. The 12-foot strip.

Q. I call your attention to Plaintiff's Exhibit "I", which are pages of two local newspapers here in Reno, Nevada, the Nevada State Journal, bearing date December 2, 1945, and the Reno Evening Gazette, bearing date December 3, 1945, under the caption, "Work on New Mapes Hotel Goes Forward", and I will ask you if you know from what source the information in that article was obtained?

Mr. Cooke: Objected to unless the article is offered in evidence.

Mr. Platt: It is in evidence.

The Court: Exhibit "I" I think has been admitted. It is two newspaper articles.

Q. Who gave the newspapers that article, the substance of it?

Mr. Cooke: If you know.

A. I think the son gave it to them.

Q. Your son? A. Yes.

Q. Charles W. Mapes, one of the defendants?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Yes. At the request of Mr. Denson. Mr. Denson kept saying, "Don't you think we should put something in the paper regarding our association?" and then he sent his background and [537] I told him I thought it was too soon, it was premature.

Q. Was it done with your knowledge and consent? A. I knew it was being done, yes.

Q. You offered no objection? A. No.

Q. And you were familiar with the contents of the article before it appeared? A. Yes.

Q. In the article in the Nevada State Journal it is stated: When completed the hotel will be furnished by Mapes and Peter G. Denson, who now owns and operates the Hotel Johnson at Visalia, California. Denson is an engineer by profession and for many years was engaged in building railways, * * * etc.

A. That is the article Mr. Denson sent in.

Q. Well, did you have knowledge that that portion of the article, along with the rest of it, was to appear in the newspapers? A. Yes.

Q. And it was published with your consent?

A. I knew it was being published, yes.

Q. And the Reno Gazette article of December 3, 1945, there appears among other things this statement: "The hotel is being built and will be managed by the firm of Charles W. Mapes, Jr., and Peter G. Denson. Denson has been active in the hotel business for nearly 30 years and owns and operates [538] the Johnson Hotel at Visalia, Cali-

(Testimony of Mrs. Irene Gladys Mapes.)

ifornia, is a member of the Oakland State and Southern California State Associations. He has managed and owned many hotels in California and Oregon. He is an engineer by profession and was a Captain in the First World War. * * *'' You knew about that before it was published?

A. Yes. I thought it was being published too premature, as I explained to you, but Mr. Denson was very anxious to have something in the paper about the hotel being started and that they would be the managers of it and he sent his background as to being an engineer.

Q. Didn't you and your son and Gloria have a desire, as a matter of pride, to have this article published?

A. No.

Mr. Cooke: I object——

The Court: It is already answered.

Mr. Cooke: I can't jump on my feet before the answer is finished.

The Court: It may go out.

Mr. Cooke: I wish to interpose the same objection as made heretofore, that this is irrelevant and immaterial as to the meaning, construction, terms and conditions of the agreement of September 24, 1945. It does not make any difference how many publications were made or what pride or lack of pride they had. It is not a matter, your Honor, that your Honor could pass upon. It is absolutely irrelevant to the [539] question of what this contract calls for and whether it is a contract or not.

The Court: This was after the contract, wasn't

(Testimony of Mrs. Irene Gladys Mapes.)

it, and there is a contention here that the provision of the contract making all the essentials was violated. That is one of the contentions, isn't it?

Mr. Platt: Yes.

The Court: This might have some bearing on that. I am not able to state at this time, so the objection will be overruled.

A. No, I can't think of it as pride. I know at the time I thought it was premature. I think we are very retiring, as far as newspaper notices are concerned.

Q. Did you ever express any desire to Mr. Denson in effect that as soon as work started you wanted some newspaper publicity? A. No.

Q. Never at any time? A. No.

Q. You will note in these two exhibits, the architect's drawing of the Mapes Hotel and illustration.

A. Yes.

Q. Who furnished them?

A. Mr. Moorehead. [540]

Q. To you? A. To my son, I believe.

Q. How did the newspapers get the cuts?

A. When we got them.

Q. From you?

A. Yes, from my son. This was done through the urging of Mr. Denson.

Q. Well, you said that many times, Mrs. Mapes. I am asking you a question now as to how it came that the newspapers got these cuts and you replied through your son? A. Yes.

Q. These articles in the Hotel Journal publica-

(Testimony of Mrs. Irene Gladys Mapes.)

tions which are in the record as Plaintiff's Exhibit "J," were you familiar with the contents of these articles? A. No.

Q. Did you ever see them? A. No.

Q. Did Mr. Denson tell you that they were to appear in these various magazines?

A. He told me he was going to write some articles on his own.

Q. And were they all done with your approval?

A. No.

Q. Did you offer objection to them?

A. No.

Q. Well, you state that they weren't done with your approval, [541] but you offered no objection?

Mr. Cooke: She didn't know anything about it.

A. I didn't know anything about it until after he told me they had been published.

Q. Did you register any objection afterwards?

A. No.

The Court: I thought you testified Mr. Denson told you he was going to publish those articles.

(Previous testimony read.)

Q. I think I asked you this question yesterday, but I am going to ask it again. Did Mr. Denson call you on long distance phone from Visalia, California, on the 25th day of March, 1946?

A. He called me on—he called my son on the 25th of March and I answered the phone. I wouldn't know where he called from.

Q. Do you know how long the conversation continued?

(Testimony of Mrs. Irene Gladys Mapes.)

A. No, I couldn't tell you that.

Q. Well, isn't it a fact that he talked to you personally for about eight minutes?

A. Oh, it was a long conversation.

Q. What did he say and what did you say?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. Well, his call was for Charles and Charles wasn't there and he said he was anxious to have Charles come down to Los [542] Angeles to see an interior decorator and my conversation to him was, "Mr. Denson, when are we going to get together on this lease? This decoration, aren't you getting the cart before the horse, going after these decorations before we are in agreement on the lease?", and we talked and I told him how he had promised to come back after the 25th of January and to get together on the lease and agreement and he said well, the time had expired on that agreement.

Q. He said that?

A. Yes, he said this over the phone. We had a long lengthy conversation and after he had said that, I still asked him to get together on the lease with us and agreement and he said he would call Charles back the next night.

Q. Let me get this straight. Mr. Denson told you over the phone that his contract had expired?

A. That that preliminary agreement had expired.

Q. Had expired? A. Yes.

Q. What else did he say about it?

(Testimony of Mrs. Irene Gladys Mapes.)

A. And I asked him though when we could get together on the agreement and a lease after that.

Q. Notwithstanding, as you testify, he told you that contract or agreement had expired——

A. Yes.

Q. He wanted Charles to come to Los Angeles to arrange for [543] the fixtures and furniture?

A. No, this was before. That was the first part of the conversation, Mr. Platt.

Q. Well, in that conversation——

A. (Interrupting) Yes.

Q. ——Mr. Denson requested that Charles come to Los Angeles?

A. His first part of the conversation was that Charles come——

Q. (Interrupting) In order to arrange for furniture and fixtures?

A. That he had been talking with Miss Mason for the decoration.

Q. What did you tell him about that?

A. I told him wasn't this getting the cart before the horse? "When are we going to get together on our lease and agreement?" He had promised to come back after January 25th and this was the first we had heard from him.

Q. Did you ever offer or tender him a lease?

A. Yes—not as a lease, no. I asked him to get together to draw up a lease.

Q. But you didn't ever offer him a proposed lease? A. No.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Did you ever tell him in effect that if he didn't sign a lease or you couldn't get together on a lease, that you would nullify the agreement?

A. No. [544]

Q. Well, did you tell your son Charles about the desire of Mr. Denson to have him go to California to arrange for fixtures and furnishings?

A. I told my son that Mr. Denson would call him the next night and I told him of my conversation with Mr. Denson on the phone.

Q. Well, did Mr. Denson call him the next night?

A. He called him the next night. I wouldn't say the next night, but a night or so after that. I don't have those dates definite.

Q. And do you know, of your knowledge, whether Charles went to meet him to arrange and participate in that interview with respect to furnishing the hotel?

A. Well, Charles called him the 29th of March; we called him the 29th of March, and we wanted to get together with him on an agreement and a lease.

Q. Charles wanted to get together with Mr. Denson on an agreement and a lease?

A. Yes, I asked him on that occasion would he get together with my son on a lease.

Q. Do I understand you to state now that Charles phoned Mr. Denson and told him that he wanted to get together with him on an agreement and a lease?

A. Yes, I think the call on the 29th, when Charles spoke to him on the 29th, it was stated that he would

(Testimony of Mrs. Irene Gladys Mapes.)

meet him in San Francisco and I asked him at that time could we get together [545] on a lease.

Q. Well, what did Mr. Denson say? Did he refuse to get together on the lease?

A. He said he would.

Q. He said he would? A. Yes.

Q. And that was on——

A. (Interrupting) But he wanted Charles to come to San Francisco.

Q. Those two phone calls between Mr. Denson and you and Mr. Denson and your son, Charles Mapes, occurred on March 25th and March 26th, 1946?

A. And one that we phone Mr. Denson on March 29th.

Q. And you phoned him on March 29th?

A. Yes.

Q. Where was Mr. Denson then?

A. I believe Visalia; I know it was Visalia.

Q. When you say "we," whom do you mean? You both phoned him, you and Charles?

A. We both talked on the phone. Charles called him.

Q. What was said in that conversation?

A. Well, I asked him couldn't we get together. He had admitted on the 25th that the preliminary agreement had run out and I said, "Couldn't we get together on our agreement and lease?" and he said he would. [546]

Q. That was on March 29th?

A. This conversation, that I talked to him.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. In other words, according to your testimony, he was ready and willing to sign a lease and get together on the lease on that day?

A. Well, really, I don't know how he did answer me on that. I asked him to get together. I don't recall really what his answer was. I asked him would he get together with me on the lease and agreement.

Q. Well, according to your testimony, Mrs. Mapes, you were ready and willing to get together with him on a lease on the 29th of March?

A. Yes.

Q. And notified him to that effect?

A. Yes; after he had told me that this preliminary agreement had run out.

Q. You are very certain he told you that?

A. Yes, and I was very certain I kept after him to have him get together on the lease and agreement.

Q. Well, of course, you know of your own knowledge that Charles went to California and met with Mr. Denson? A. Yes.

Q. And Miss Mason and Mr. Moorehead and Mr. Slocum?

A. From what they told me, yes.

Q. And Charles told you all about that? [547]

A. Yes.

Q. When he came back?

A. Well, he called me from San Francisco.

Q. He called you from San Francisco?

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. When did he call you? A. April 1st.

Q. 1946? A. Yes.

Q. Well, did Mr. Denson come to Reno shortly after that?

A. He came April 10th to Reno.

Q. And when and where did you see him in Reno? A. In my home.

Q. Was that on April 10th?

A. On April 10th.

Q. And what did you tell him and what did he tell you or what was the conversation between the two of you?

A. Well, Mr. Denson said that I had agreed to build him a hotel and after agreeing to build him a hotel I begged him to take my son Charles in as an associate. On my begging, he took Charles in to be an associate without looking into Charles' background or ability. Now he says "Charles refuses to enter into a lease with me on this hotel," and he said "I have a binding agreement with you and I propose to have this enforced." He said, "If Charles doesn't want to enter [548] into a lease with me, I am ready and willing to accept the lease by myself."

Q. Then according to that, Mrs. Mapes, he evidenced the utmost willingness to enter into a lease?

Mr. Cooke: Objected to as argumentative.

The Court: Well, that might be. Objection sustained.

Q. Well, was it a fact that Charles wouldn't sign a lease?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Charles told me from San Francisco that he wouldn't enter into a lease with Mr. Denson.

Q. Charles told you?

A. Yes, he called me on the telephone from San Francisco.

Q. And what day and date was that?

A. April 1st.

Q. And did Charles tell you that he told Mr. Denson that?

A. He called me and he said, "Mother, I am not going to enter into a lease with Mr. Denson. No one can make me enter into a lease with Mr. Denson." I said, "Charles, what are you saying?" and he repeated it and I said, "Now, don't get excited, just stop and think it over" and I said, "Couldn't you get Mr. Denson and we all get together?" and I believe that was the reason Mr. Denson came to Reno April 10th.

Q. Well, when Mr. Denson came to your home what was said?

A. By whom?

Q. Well, I will withdraw that question for the moment. When he came to your home who were present? [549]

A. When I was there?

Q. Yes.

A. My son Charles, my brother, William S. Hall, and Mr. Denson and myself.

Q. What was the conversation, what was said.

A. What conversation are you speaking about?

Q. That you and Mr. Denson and your son had at your home in the presence of these other people?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I just told you the conversation I had with Mr. Denson in my home.

Q. Well, I am sorry, Mrs. Mapes.

A. Mr. Denson came to the home early and he and Charles were together. I came a little late. I might explain that. I had a meeting where I was responsible for some monies, a board meeting, and I went—it was at 10 o'clock—and I asked if I could give my report and leave quickly and they permitted me to do so and I came home.

Q. Of course, you don't know anything about the conversation when you were not there?

A. No, not when I wasn't there.

Q. What I am trying to find out, what was the conversation with you and Mr. Denson present?

A. The only conversation with Mr. Denson is what I just told you.

Q. Will you repeat that? [550]

A. Mr. Denson said that I agreed to build him a hotel and after agreeing to build the hotel that I had begged him to consider my son, Charles, as an associate with him. that through my begging he considered Charles without looking into his background or ability and that Charles had refused now to enter into a lease with him and that he had a binding contract with me and he proposed to enforce it.

Q. Well, what did you say in response to that statement?

A. Well, I told my feelings. I was rather mad.

Q. You were mad?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I was rather shocked when he said I begged him to take my son Charles in as an associate and I think the mother in me rose up and I said, "Mr. Denson, I don't have to prove to anybody that I am a real mother." I said, "My life is my children." I said, "If God were to come into this living room this very minute and ask which one he should take first, I would say, 'Please, God, take me and spare my children'." Then I said, "It is all very evident now, Mr. Denson, why we have never been able to get together on a lease and agreement. This clears it all up."

Q. Well, let me ask, Mrs. Mapes, upon that occasion did Mr. Denson tell you that he would go through with the contract, or words in substance to that effect?

A. He told me that Charles wouldn't go through with the contract, refused to go through with the contract. [551]

Q. Well, did Mr. Denson tell you that he would refuse to go through with the contract or would refuse to take a lease from you to himself and Charles as lessee?

A. He said he was willing, if Charles wouldn't go through with the contract to take it himself.

Q. Oh, he said if Charles wouldn't go through with the contract he would take the lease in his own name?

A. He was willing and able to.

Q. But he never offered any objection to taking Charles in as a partner, lessee?

A. No.

Q. Well, after this part of the conversation, was there anything else said?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Well, I think after Mr. Denson talked and after I had talked to Mr. Denson, he became very red in the face and he asked Charles how about fixing us a drink. We had a drink and then they left the house.

Q. Do you remember what day of the week that was?

A. That was April 10th.

Q. Where did Charles and Mr. Denson go, if you remember?

A. Well, they were going down town.

Q. Well, did they have an appointment with Mr. Cooke?

A. Not that I would know of.

Q. Well, didn't you suggest that they do down and see Mr. Cooke? [552]

A. No.

Q. You don't know whether they saw Mr. Cooke or not?

A. I recall that Charles had an appointment down town and he took Mr. Denson with him. I don't know what——

Q. (Interrupting) Did Charles later report that they went to Mr. Cooke's office?

A. Yes.

Q. What did Charles tell you?

A. Well, he went to Mr. Cooke's office to tell Mr. Cooke that he wasn't ready to go through with this lease.

Q. Well, can you remember what Charles told you said and what happened in Mr. Cooke's office?

A. I think Charles told Mr. Cooke why he wasn't ready to go ahead with this lease with Mr. Denson.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Well, did he give any reason? A. Yes.

Q. What did he say?

A. That Mr. Denson had ignored him, that he didn't consider him at all in the agreement, that he was going to be the manager and Charles was to go to college and he disregarded every claim as to the amount that each one was supposed to have in the hotel. It was a 30-70 proposition and he said this is a 50-50 proposition and it was then that Charles refused to associate with him.

Q. Has Mr. Denson ever refused to comply with the agreement [553] as it is written and as it is in evidence here.

A. Charles refused to comply.

Q. Charles refused to comply?

A. Refused to associate with him.

Q. As it is written? A. Yes.

Q. Are you ready and willing now to go through with the agreement as it is written?

Mr. Cooke: Objected to as immaterial. It is not a question of the status now. The question is what it was at the time the action was commenced.

The Court: Objection overruled.

Witness: I would have to have the advice of counsel before I answered that question.

Mr. Cooke: Tell him no.

A. No.

Mr. Sinai: I never heard that in a courtroom before.

The Court: That may go out, stricken from the

(Testimony of Mrs. Irene Gladys Mapes.)

record. The question he has propounded to the witness, what is your answer?

A. No.

(Short recess.)

Mrs. Mapes resumed the witness stand.

Mr. Platt: You may cross-examine. [554]

Cross-Examination

By Mr. Cooke:

Q. You testified on your examination by plaintiff's counsel a moment ago of some meeting in December with Mr. Denson, do you remember about that? Did you have any meeting with him in December of 1945? A. In person?

Q. Yes. A. No.

Q. Let me ask it this way. After the September 24, 1945, document was signed, when was the very first time after that—that was signed, you said, on October 4th? A. Yes.

Q. When was the very first time after October 4th that you saw Mr. Denson next?

A. January 25th.

Q. You mentioned that date, did you, in fixing that particular date, or do you mean that is the approximate date?

A. He was here for three days on that date, the 24th, 25th and 26th and I have that date in my mind because it is the date that we filed the permit for construction of the building. We had the plans and specifications ready at that time.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Was that one of the occasions when he was a guest at the house? A. No.

Q. How many times did you meet him? What I am trying to get [555] at, Mrs. Mapes, about what was the length of your conversations or meetings with him, discussions with him, during those three days he was here in January, 1946?

A. I recall one meeting with him where I had asked him if we could get together on drawing up the lease.

Q. What I am asking though, Mrs. Mapes, is about how much of these three days did you see of him, that is to say, how many meetings did you have with him? I mean in regard to the hotel business.

A. There were two days there.

Q. Well, you don't mean that you and he talked for a full two days? A. Oh no.

Q. About how many minutes or hours altogether did you and he discuss your hotel business?

A. Well, I think we went over what was going on, as far as the construction was concerned, the building.

Q. What was said at that time by either you or Mr. Denson in regard to the construction and the stage of it and the progress of it? As near as you can recall.

A. The building had actually started.

Q. I am asking you to state what was said, if you can recall it, or as nearly as you can recall it. What was said by you to Mr. Denson or him to you about the construction?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I think I told him that it had definitely started and we [556] had the plans and specifications and I asked him if we couldn't get together on the lease.

Q. What, if anything, was said in regard to permit from the city authorities for the building, or the greater portion of it at that time?

A. We were taking out the permit for the building.

Q. Was that about the time that the permit was actually obtained? A. Yes.

Q. What did Mr. Denson say about the permit or about the matter of your getting together on the lease?

A. He said he had to leave town at that time and he would come right back.

Q. Did he say where he was going or why he had to leave?

A. Yes, he had to go home to wind up some business he had in Visalia.

Q. How long was he in Reno after you had told him you would like to get together with him on the lease?

A. That was after I asked him could we get together on the lease he told me he would have to leave.

Q. How soon after that did he leave? Do you remember him staying around here or did he leave right away?

A. No, he left right after that.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Did you have any plans or specifications in the house or before you at the time you were having your talk with Mr. [557] Denson? A. Yes.

Q. Did you show him the permit?

A. I think he saw that down in the office.

Q. What office do you refer to?

A. The construction office.

Q. That is the hotel? A. Yes.

Q. Do you think that from anything he told you, or why do you think it?

A. We were there discussing that actual construction had started and that permit was taken out or being taken out.

Q. This was on January 25th or 26th?

A. 25th or 26th, yes.

Q. How long before January 25th did you have the permit?

A. It was taken out around that time.

Q. Well, you had it when you were talking with Mr. Denson?

A. I didn't have it, no, it was being taken out.

Q. Well, I mean the company had it?

A. I think it was being taken out.

Q. Mr. Moorehead was looking after it more than you? A. More than I was.

Q. He was manager of the construction part of the Mapes enterprise, is that right?

A. Yes, of the construction. [558]

Q. What, if anything, can you tell me was the stage of the actual construction work? What were

(Testimony of Mrs. Irene Gladys Mapes.)

they working on at the time Mr. Denson was here?
What work was being done at that time?

A. Excavation for the basement.

Q. The excavation had been started some considerable time before that, hadn't it, Mrs. Mapes?

A. Well, what would you call it—the demolition, the preliminary part was being started.

Q. You have referred a number of times in your testimony, in answer to Mr. Platt's question, that you wanted to get together with Mr. Denson on the lease and agreement. What agreement are you referring to?

A. The agreement between him and my son Charles.

Q. You were interested in that were you?

A. Very much so. They were to get together on an agreement for the association.

Q. For the operation of the hotel?

A. For the operation of the hotel.

Q. You are naturally interested in it being an amicable, friendly, workable relation?

A. Yes.

Q. Was it contemplated, so far as you know, that there was to be any written agreement between him and Mr. Denson for the partnership or the like?

A. Yes.

Q. Why do you say yes?

A. Because it was supposed to be a written agreement. They were to get together to have this agreement drawn up on the basis of how they were to associate.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. You say "supposed" but did you ever hear Mr. Denson say anything about it or Mr. Mapes in the presence of Mr. Denson?

A. Yes, Mr. Denson promised to do that right after he signed that paper.

Q. Promised to do what?

A. To get together on this association agreement.

Q. On the agreement with your son?

A. Yes.

Q. For the operation of the hotel?

A. Yes.

Q. Were the terms of that discussed between you and Mr. Denson or between you and your son in your presence?

A. Yes, that was discussed before we signed this agreement.

Q. You signed this agreement, then in your reliance on that arrangement going through?

A. Yes.

Q. And the terms were discussed, as far as you can recall, as to this agreement between your son and Mr. Denson?

Mr. Platt: If the Court please, in order to preserve the record, not indicating at all that I am making an objection [560] to keep anything out of the record, but I do want to interpose this objection to this type and character of testimony, because there is nothing in the pleadings by way of allegation in the complaint or amended complaint, or by way of answer or denial or affirmative de-

(Testimony of Mrs. Irene Gladys Mapes.)

fense that sets up such a defense that there was an understanding or a side agreement, that this main agreement was contingent or dependent at all upon any understanding existing between Charles Mapes and Mr. Denson. It is entirely foreign to the issues.

Mr. Cooke: I do not see how counsel can say it is foreign to the issues when on his own examination he brought out repeatedly from Mrs. Mapes there were these references to an agreement and lease. Now I am trying to find out what this agreement is she is talking about. I think it is proper, in view of his cross-examination or direct examination, whatever you might call it.

The Court: I don't see how it affects the situation here. Objection will be sustained—not being a matter of any defense or affirmative matter in the answer. Objection will be sustained.

Mr. Cooke: It is true we have not pleaded it—it is under the notion that we had a right to go into subjects opened up on plaintiff's examination.

The Court: Just what was opened up, what portion or subject matter discussed on plaintiff's examination would [561] open up this inquiry?

Mr. Cooke: When she refers to the agreement, refers that she wanted to see him about the agreement, wanted to see him about the lease. I want to find out what the agreement was, what that transaction was.

The Court: Does it go to bearing on the question

(Testimony of Mrs. Irene Gladys Mapes.)

as to whether or not Mr. Denson was ready, willing and able at all times to receive or execute a lease?

Mr. Cooke: No.

The Court: Objection sustained.

Mr. Cooke: We note our objection.

Q. You stated in your direct examination, Mrs. Mapes, that in one of the conversations that you had with Mr. Denson out at the house the matter of the division of the profits or hotel operations between your son and he were discussed, do you remember that? A. Yes.

Q. What conversation was that?

A. That was a conversation on their getting together to agree to the agreement of the association.

Mr. Platt: I did not object, if the Court please, I did not think counsel would persist in the fact of your Honor's ruling, but I ask that the answer be stricken.

The Court: It may go out for the purpose of making [562] any objection that you might desire to make to the question.

Mr. Platt: Upon the same ground as the previous objection, your Honor.

(Question read.)

The Court: That was brought out and allowed to go in without any objection on the part of the defendant. Objection to that question will be overruled.

Mr. Platt: Well, of course, I submit your Honor,

(Testimony of Mrs. Irene Gladys Mapes.)

it was a volunteered statement, although I didn't move to strike it, but we defer to your Honor's ruling.

The Court: You may answer the question.

Q. What conversation was it, Mrs. Mapes, at which this talk of division occurred?

A. Why, Mr. Denson was to get 30 per cent—

Q. What conversation was it, what time? Identify the talk and where it was had, if you can.

A. It was in my home, Sunday evening.

Q. With reference to date September 24th?

A. Saturday evening.

Q. September 24, 1945, was it before or after that date? A. Before.

Q. How long before?

A. Before September 24, 1945? [563]

Q. Yes, how long before?

A. A day or two before.

Q. It was a part of the discussion then that led up to the drafting of that September 24th instrument? A. Yes.

Q. Just what did Mr. Denson say about that subject, about division? What was said about that?

A. It was agreed at that time—

Q. (Interrupting) No, don't say what was agreed. Tell us what was said and who said it, if you can, as nearly as you can remember.

A. Well, Mr. Denson said he wanted to be a partner of Charles in any way and would take 30% as Charles suggested and Charles could have the 70%.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. That would be of the profits?

A. Of the hotel, the association.

Q. What had Charles said previously about that?

A. Well, that was Charles' ruling, that he would only go in with Mr. Denson——

Q. (Interrupting) No, tell us what he said to arrive at the conclusion. What did Charles say in regard to it, what he wanted by way of division at that time?

A. He wanted 70% of the hotel.

Q. Thirty per cent to go to Mr. Denson?

A. And 30 per cent to go to Mr. Denson. [564]

Q. That is what he said? A. Yes.

Q. And Mr. Denson made the reply you have already testified to? A. Yes.

Q. Did you ever hear anything further in regard to that division being satisfactory or unsatisfactory, so far as Mr. Denson was concerned?

Mr. Platt: Objected to upon the ground of being a conclusion.

The Court: I think the objection will be overruled. You may answer the question.

A. What do you mean?

(Question read.)

A. Not until my son had told me of his visit with Mr. Denson in San Francisco.

Q. That was on or about April 1st?

A. April 1st.

Q. That is 1946? A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. And what was it that your son told you about Mr. Denson's reaction to that on that occasion?

A. That he denied it was a 30-70 proposition and he was going to hold out for 50-50.

Q. Who was going to do that? [565]

A. Mr. Denson.

Q. The result of the April 1st meeting in San Francisco was that finally in the sense that it came to a break in the thing, or was it contemplated that negotiations would be continued? Can you tell me about that?

Mr. Platt: I submit, if the Court please, that it seems to me conversations should be narrated to the Court and the Court and the Court reach the conclusion.

The Court: I think that objection is well taken. Sustained.

Q. Your son reported to you shortly after, or on this day, April 1st, 1946, of the disagreement he had with Mr. Denson about the division?

A. Yes.

Q. Were there any other complaints that your son made about Mr. Denson, or did he mention any other situation?

A. Yes, he said that Mr. Denson had just ignored him throughout, treated him as a child.

Mr. Platt: We ask that be stricken upon the ground it is hearsay.

Mr. Cooke: They went into it on cross-examination. I think that opens the door.

The Court: There are many matters admitted

(Testimony of Mrs. Irene Gladys Mapes.)

on cross-examination without any objection as to what took place between Mr. Charles Mapes and Mrs. [568] Mapes. Now wouldn't that have been subject to the same objection as this present objection?

Mr. Platt: Of course, they were co-defendants, your Honor, but here they are trying to bring out a conversation that was had between Mr. Denson and Mr. Charles Mapes and they are trying to bring it out by a statement which Mr. Charles Mapes made to Mrs. Mapes out of the presence of Mr. Denson.

The Court: Objection sustained.

Mr. Cooke: We except on the ground that the matter is brought up by examination of plaintiff's counsel by asking for report of statements made by Charles Mapes to Mrs. Mapes in connection with the very telephone communications I am now asking about.

(Noon recess.)

Afternoon Session, December 11, 1946

2:00 P.M.

Mrs. Mapes resumed the witness stand on further examination by Mr. Cooke.

Q. Mrs. Mapes, you were asked on examination by plaintiff's counsel, about a meeting in September of 1944 with Mr. Denson. Do you remember about that?

A. September, '44?

Q. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

A. Mr. Denson came to our home? [567]

Q. Yes. In regard to the time, is September the time or not? What I want, are you fixing that as a time of that conversation?

A. I recall it was in September of 1944.

Q. I think you said that there were Charles and yourself and Mr. Denson at the house at the time?

A. Yes.

Q. Was that the first time that the matter of Charles being interested in the operation of the hotel was discussed with Mr. Denson?

A. No. What do you mean, Mr. Cooke?

Q. I mean the first time you mentioned it to Mr. Denson? A. No.

Q. When did you first mention to Mr. Denson that it was contemplated Charles was to be interested in the hotel?

A. When he came to see me in the spring of '44.

Q. In the spring? A. Yes.

Q. What time in the spring about was that?

A. Well, I couldn't definitely say. It was in the spring. I couldn't say what month definitely.

Q. Where was that talk had?

A. In my home.

Q. Who were present?

A. I was there and Gloria was there. I don't think she was there while we were talking. She was at home. [568]

Q. Where was Charles at that time?

A. Charles was in service.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. He wasn't there on leave or anything of that sort? He wasn't there at the house? A. No.

Q. Was there anything said at that time in regard to Charles being interested in the operation of the hotel?

A. I said as soon as Charles returned we had planned to build a hotel.

Q. What did Mr. Denson say?

A. Mr. Denson said, "I see you haven't done anything with your property", and I said, no, I was waiting for my son to return from service, at which time we planned to build a hotel.

Q. What, if anything, was said directly upon the matter of your son being interested in the operation of the hotel, if you remember?

A. Well, it was carrying out my husband's plans. He had planned that this property was supposed to be for my son and that my daughter was supposed to get some interest, that is the financial end of it, that Charles would reap the benefit of the development of it. We had enough property of our own. This was sort of a new thought.

Q. But I am asking, Mrs. Mapes, if that was discussed with Mr. Denson?

A. I think I just told him in the conversation.

Q. You mean you told him what you related now? A. Yes.

Q. Do you remember what he said about it?

A. I don't know as he said anything at that time. He said he was always desirous of getting

(Testimony of Mrs. Irene Gladys Mapes.)

into Reno, that he had tried once before to get into Reno and wasn't successful.

Q. Was there anything said at that time in regard to Mr. Denson becoming interested in the hotel in any way? A. No.

Q. When was that particular subject first mentioned between you and Mr. Denson?

A. I think when he came back the second time in September.

Q. In September in 1944?

A. Yes, in 1944.

Q. This meeting you just told us about was in the spring? A. In the spring of '44?

Q. And your best recollection then is that the first time Mr. Denson was contemplated as being interested in the hotel was in September, 1944?

A. Yes.

Q. Do you remember just what was said about that particular subject?

A. He said he was awfully interested in our project, he would take any little bit and part of it.

Q. Well, what did you say? [570]

A. I said that would be up to my son. I didn't give it any thought, left that to my son to decide, to Charles.

Q. Did Mr. Denson express any desire to see Charles or talk the matter over with him?

A. This was after he had met Charles in September at the home.

Q. He met him in September, 1944, is that right? A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. When did he first meet Charles, so far as you know?

A. That was the first meeting.

Q. Oh, at that same meeting? A. Yes.

Q. Was that substantially all that was said in regard to the hotel and the hotel operation, the association of Charles with Mr. Denson, etc.?

A. I just can't recall. I think Mr. Denson many times remarked how anxious he was to be any small part in the hotel, but I just don't recall.

Q. My question was limited to this meeting, as to whether you related all that you recall that was said upon that subject at that meeting?

A. Yes, as far as I can recall.

Q. Now the next meeting was in 1945, I think you told us, August, 1945, is that right?

A. Yes. Oh, I don't know. He might have come once or twice after that. I said the next I recall was 1945. [571]

Q. The next meeting you recall where anything was said in regard to hotel business was in August, 1945, is that right? A. Yes.

Q. That was about a month or more prior to the signing of the September 24th document?

A. Yes.

Q. Where did that meeting take place?

A. At the Sir Francis Drake.

Q. In San Francisco?

A. In San Francisco.

Q. And who besides yourself and he were present, if anyone?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Mr. Slocum and Mr. Moorehead, my daughter Gloria, Mrs. Denson, Mr. Denson and myself.

Q. What was the occasion of that meeting, as far you know?

A. Well, I had made arrangements with Mr. Moorehead to go and look over plans he had there submitted to me.

Q. Plans for the hotel building? A. Yes.

Q. Was that the principal purpose, as you understood it, of that meeting?

A. The only principal purpose?

Q. No, the principal purpose, or did you have some other business down there at that time?

A. No, we had business in San Francisco at that time.

Q. You had other business? [572]

A. Yes.

Q. You didn't go down especially for this?

A. Well, Mr. Moorehead called me and asked me if he couldn't come to Reno and I told him we had this business appointment and it would be easy for me to go down and keep the appointment down there. I would save him a trip.

Q. Where was the meeting in August, 1945? You told us the Sir Francis Drake?

A. The Sir Francis Drake.

Q. Did you tell us who were present?

A. Yes.

Q. Yourself and Gloria—

A. Do you want me to repeat it?

Q. I wish you would, yes.

(Testimony of Mrs. Irene Gladys Mapes.)

A. Mr. Moorehead, Mr. Slocum, Mrs. Denson, Mr. Denson, Gloria and myself.

Q. Had you had any communication, by telephone or otherwise, with Mr. Denson about this meeting shortly previous to that date?

A. I don't recall that I did.

Q. Anyway he was there?

A. He was there.

Q. How long a time did that meeting take?

A. Well, we met—that took up the forenoon of that day.

Q. Was other business discussed during that forenoon? [593]

A. Plans were discussed.

Q. Plans for the hotel? Mr. Moorehead had some there, did he, presented for consideration?

A. Yes.

Q. Were there any changes made in those plans or changes suggested by anybody at that meeting?

A. Yes.

Q. Who suggested the change?

A. Well, I made several suggestions.

Q. Did anybody else make any suggestions?

A. I don't recall right now that they did, Mr. Cooke.

Q. What suggested changes did you make?

A. Well, the entrance of the hotel, the lounge, the coffee shop, and then the dining room was on an elevation.

Q. There were changes that you suggested from those as exhibited on the plans?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Yes, quite a few changes.

Q. And were the changes made at that time, do you know?

A. Mr. Moorehead said he would at a latter date have these changes made.

Q. I mean were any notes made on the plans at that time?

A. Yes, Mr. Slocum was there and made them.

Q. Do you recall any other changes that you suggested besides those you just mentioned?

A. No, I don't recall just at this time. [574]

Q. You said that this business was transacted in the forenoon of that day. How about the afternoon? Did you have any further meeting in the afternoon?

A. Yes, we had lunch and then we went to see some apartments.

Q. What was the purpose of that?

A. During the conversation, may I say, in the forenoon I said to Mr. Moorehead I wasn't quite convinced in my own mind how these apartments should be laid out. I truly couldn't definitely decide and I wondered if I could see some that I might get a little idea from.

Q. Apartments in San Francisco?

A. Yes, anywhere. I don't know as I meant it just then, but I was anxious at any time to see apartments that I might get a little idea from.

Q. Then in the afternoon did you do something about that? A. Yes.

Q. What did you do? Who went with you?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Mr. Moorehead, Mr. Denson, Mrs. Denson, Gloria and I.

Q. How many different places did you visit?

A. As I recall, three or four.

Q. And was that practically all the afternoon taken up in that way?

A. Well, a good part of it, yes.

Q. Did you have any further discussion as to plans for the hotel building? [575]

A. I said to Mr. Moorehead after trip, "Well, this doesn't give us a very good idea, but would you give it a lot of thought and express yourself and I shall give it a lot of thought in the meantime."

Q. Was that said in the presence of Mr. Denson, do you recall?

A. Yes, before all of us.

Q. You were all there together?

A. Yes.

Q. Now then what did you do after making this round of inspection in the afternoon of that day. Did you come back to Reno?

A. No.

Q. Did you have any further meeting with Mr. Denson at that time?

A. Not that I recall.

Q. So there was just one day at this Sir Francis Drake meeting which you have detailed here already and that is the business you transacted.

A. On business, yes.

Q. When did you come back to Reno after that?

(Testimony of Mrs. Irene Gladys Mapes.)

A. About two days later. That day was a holiday, V-J Day.

Q. That would be August 14th?

A. Well, was V-J Day the 14th? If it were, then it was the 15th that we had this meeting and went around and looked at the apartments. [576]

Q. Now the next meeting after this one in August of 1945 was that the following September 23rd or 24th?

A. It was about two weeks later.

Q. That would be about September 1st, wouldn't it?

A. Well, I don't know. The latter part of August or the first of September, I couldn't definitely say.

Q. Where was that meeting held the latter part of August or the first of September?

A. Fielding Hotel in San Francisco.

Q. Who were in the party on that occasion?

A. Mr. Moorehead, Mr. Slocum, Mr. Denson, Charles and I.

Q. Where did you first meet, down there in San Francisco I mean? Where did your party get together and meet, at the Fielding or some other place?

A. This day you are speaking of?

Q. Yes.

A. At the Fielding.

Q. You met at the Fielding?

A. At the Fielding Hotel. We were stopping there.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. What was the occasion? How did that party get together and what was the purpose of it, so far as you know?

A. We were to see the corrected plans that Mr. Moorehead had brought, made from the suggestions at the first meeting.

Q. You mean the corrections that were suggested at the meeting in August? [577]

A. Yes.

Q. August 14th or 15th?

A. Yes.

Q. And the meeting at the Fielding was to consider the corrections that had been put upon the plans or prints by Mr. Moorehead?

A. Well, in a way that and you know to go further ahead on the plans, yes.

Q. I see. In other words, more or less the entire subject was to be considered?

A. Yes.

Q. What time did this meeting take place in the forenoon or afternoon?

A. In the afternoon.

Q. How long a time was consumed in the consideration of these plans, etc.?

A. Well, I think we met up until noon and then we had lunch and we met after lunch.

Q. How long after luncheon, how much of the afternoon was taken up?

A. As far as I recall a couple of hours.

Q. And that all took place in the Fielding Hotel there with the exception of the time spent at lunch?

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. And all the party you named, they stayed together? [578]

A. Yes.

Q. So far as the hotel is concerned, was there anything else discussed beside the plans?

A. May I correct that? I don't know. At some of these meetings Mr. Slocum left to get busy on the plans. Now whether he stayed or not, I couldn't be sure of that, definite.

Q. Was there anything else discussed at this Fielding Hotel meeting besides the plans and corrections, etc., that you already referred to?

A. Not that I recall.

Q. Were any further changes suggested by you at the Fielding Hotel meeting by you or anybody else?

A. I don't recall any.

Q. You saw the plans with the corrections made and they were approved by you or not?

A. No.

Q. No what?

A. No, they were not approved. We were looking at the plans to continue to have more plans made. I don't know as they were approved at that time.

Q. Well, as far as they went were they approved as temporary plans, I will put it that way?

A. No, I must admit I was just looking at plans at that time. I hadn't definitely decided on the plans.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Maybe we don't understand each other, Mrs. Mapes, but at that meeting, I understand you said Mr. Moorehead was there with plans of the hotel building, which incorporated the changes that you suggested at the previous meeting several weeks before?

A. Yes.

Q. And they were corrected and as far as they went, for temporary purposes, were they satisfactory to you?

A. Yes, for temporary purposes.

Q. Those plans had to be added to and changed from time to time and that was continued down to date, as far as that is concerned, hasn't it?

A. Yes.

Q. I think I asked you this question, but to be sure I would like to ask it again. Did anybody suggest any changes to the plans as Mr. Moorehead presented them at the Fielding Hotel meeting?

A. Now that I can't recall. If any changes were suggested I don't know they stood out enough to impress me. Now I can't recall.

Q. Now the next meeting after this one in the Fielding Hotel, when was that and where was it, Mrs. Mapes? I mean where plans of the hotel were considered?

A. The next meeting was September 24th.

Q. 1945? [580]

A. Yes. May I say 22nd, as far as I can recall, 23rd and 24th, as far as I can recall those dates.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. What, so far as you know, was the purpose and object of that meeting?

A. That was the meeting for Mr. Denson to get together with Charles on the association agreement; discuss the association agreement.

Q. You say "association agreement", what do you refer to?

A. Well, would you say partnership?

Q. Well, agreement, whatever it might be called, between him and Mr. Denson, is that what you mean?

A. Between him and Mr. Denson.

Q. For the operation of the hotel?

A. For the operation of the hotel.

Q. Did the matter of whether or not a lease was to be granted by you to Mr. Denson and Mr. Mapes, was that contemplated to be taken up at this meeting in September?

A. No.

Q. Prior to the meeting itself that wasn't the contemplation, is that it?

A. No.

Q. Just a matter of this other agreement between your son and Mr. Denson?

A. Yes.

Q. Well at the meeting then the matter of the lease did come up, didn't it? [581]

A. Yes.

Q. How did it come up?

A. Mr. Denson brought out this paper that he had in triplicate and he asked me to sign it. He

(Testimony of Mrs. Irene Gladys Mapes.)
said, "It is a preliminary paper." It don't mean anything, but would show that he might eventually be part of it.

Q. You said "this paper."

A. Well, it was the paper I believe that you have here as an exhibit.

Q. I will show you paper marked Defendant's Exhibit 1 for identification and ask you to state if you can whether the typewritten part, without the lead pencil notation of the other sheet attached, is the paper you say Mr. Denson presented to you?

A. Yes, I would say that was the paper.

Q. Do you know anything about the lead pencil notations as they appear upon the exhibit?

A. Yes, I do.

Q. What do you know about them?

A. Well, those were pencilled by you.

Q. When?

A. As near as I can recall it was a Monday, September 24th.

Q. That would be what date with reference to the time when Mr. Denson first showed you the paper?

A. It was the day after. [582]

Q. The day after, that was Sunday then?

A. Sunday he showed me.

Q. He had more than one of these papers such as Exhibit 1 for identification?

A. Three, in triplicate.

Q. And is that paper now in the same condition as it was when Mr. Denson presented it to you,

(Testimony of Mrs. Irene Gladys Mapes.)

except for the lead pencil interlineation, with the other sheets attached, which you say was made by me?

A. I would say it was.

Q. They were made the following day, I think you said?

A. Yes, Monday, that is my recollection.

Q. And where did that occur?

A. In your office.

Q. Who were present on that occasion?

A. Mr. Denson, my son, you were there and I was there.

Q. Do you know anything about Miss Yparra-guire, my secretary?

A. She was there.

Q. She was in and out?

A. In and out.

Q. What time of the day did this meeting in the office occur?

A. It was early in the afternoon.

Q. Do you remember any particular instructions that Mr. Denson gave with regard to the preparation of the document for final execution and sending it to him? [583]

A. Yes, he wanted it sent to him down to, I believe, Los Angeles and have it marked "Hold."

Q. And the envelope containing it marked "Hold"?

A. Yes.

Q. Do you know what hotel he mentioned, if any?

A. No.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Do you recall the Biltmore?

A. It was one of the large hotels.

Q. Now with respect to the lead pencil interlineations and the yellow sheet attachments, what do you know about their being discussed at this meeting with Mr. Denson?

A. They were all discussed with Mr. Denson at that meeting.

Q. And what would you say as to whether any objections were made to any of the lead pencil interlineations as they were read? Was the document read to you all there at the time as changes were made?

A. Yes.

Q. They were discussed, were they, various changes?

A. Well, they were read and discussed.

Q. And as finally finished, with the changes made and yellow sheets attached as you see it now, was any objection made by Mr. Denson to it?

A. No.

Q. Or by you or Charles?

A. No. [584]

Q. Were any instructions given me, so far as you know, with regards to having it typed?

A. Yes.

Q. In its changed form?

A. In its changed form.

Q. What were the instructions?

A. To get it out as quickly as you could and mail it to him in Los Angeles.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Do you remember anything being said by Mr. Denson about the importance of getting it down to him that evening, if possible?

A. He was very anxious to get it as quickly as he could.

Q. What, if anything, was said as to why he wanted it sent to him as quickly as possible?

A. He wanted to show it.

Q. Repeat his language, if you can, as to just what he said.

A. He said he was very anxious to show this paper, to show that at a later date he might be a part of the hotel.

Q. Did he say anything about who he wanted to show it to?

A. I think to Mr. Gock, yes.

Q. Have you now related substantially all that you recall that transpired at the meeting in my office when the agreement was discussed for re-drafting?

A. No, it was always contended that this was just a preliminary agreement and later we would get together to agree—— [585]

Q. (Interrupting) Well, what I am trying to find out, what took place at that particular meeting. Was anything said then as to whether it was a preliminary agreement or the final agreement or the like?

A. Yes.

Q. What was said and who said it?

A. Mr. Denson said this was a preliminary

(Testimony of Mrs. Irene Gladys Mapes.)

agreement and we would see if we could get together to agree and that I was supposed to be taken care of. At a later date if we could agree, I was supposed to be considered.

Q. In connection with this statement that you already testified to, that he wanted the document to show, do you remember anything being said by me as to why he had this agreement now when the final agreement or lease was supposed to be drawn within ten days or so?

A. You asked us why we would have this preliminary agreement when we planned to have the real agreement drawn later.

Q. Mr. Denson was there during the entire conversation?

A. Yes, Mr. Cooke.

Q. You all went out together?

A. Yes.

Q. I don't know as I got an answer to that other question, but I asked you to state, if you recall, what, if anything, I said about why we should have this preliminary agreement when the final lease was to be prepared within ten days or [586] something like that?

A. Yes, you asked why we would want this preliminary agreement drawn, in view of the fact there was to be one later.

Q. Who was that question addressed to, so far as you know?

A. Mr. Denson.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. What did Mr. Denson say?

A. He wanted this to show.

Q. That is when that came up?

A. Yes. When Mr. Denson presented this paper, I think I asked him why I should sign this preliminary paper when I should get the real papers soon.

Mr. Cooke: We offer the Exhibit 1 for identification in evidence, your Honor, as exhibit on cross-examination.

Mr. Platt: We object to it, if the Court please, upon the ground it is a self-serving document.

The Court: Is that the document Mr. Denson brought with him from California?

Mr. Cooke: That is the testimony of the witness.

Mr. Platt: No, your Honor, it is not the document Mr. Denson brought. It is a document revised and interlined by notations, primarily by counsel. It is not the document brought by Mr. Denson.

Mr. Cooke: My document I mean the typewritten portion. The witness identified the typewritten portion as being [587] the document. She testified all the interlineations and the yellow sheet were put there by me, so you know just what part of the document.

The Court: All done in the presence of Mr. Denson, was it, the changes made?

A. Yes.

The Court: Objection overruled. Admitted in evidence as Defendant's Exhibit 1.

Mr. Platt: If your Honor please, may I ask the witness a question?

(Testimony of Mrs. Irene Gladys Mapes.)

The Court: Yes. I will withdraw the ruling.

Q. (By Mr. Platt): Were those interlineations and notations read to Mr. Denson?

A. Yes.

Q. Who read them?

A. Mr. Cooke.

Q. Did Mr. Denson make any observations with respect to them?

A. Well, he listened the way the rest of us did. He agreed that they were all right.

Q. Isn't it a fact, Mrs. Mapes, that Mr. Denson, upon that very occasion, told Mr. Cooke to put this agreement in legal form and that was the agreement you signed and which was sent to Los Angeles?

A. To put this paper, this agreement, in legal form?

Q. Put the agreement submitted by Mr. Denson to Mr. Cooke and [588] to you, didn't Mr. Denson say and tell you and Mr. Cooke that Mr. Cooke should put it in legal form and send it to him to the Biltmore Hotel, Los Angeles?

A. No.

Q. He didn't say that?

A. No. Oh, to send it to Los Angeles?

Q. Yes.

A. That part yes, but not to put it in legal form. It was a preliminary agreement.

Q. Well, I am asking you if he didn't make that statement to tell Mr. Cooke to put it in legal form and send it to him in Los Angeles? That is his testimony.

A. No.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Well, is the agreement that was sent to Mr. Denson to Los Angeles the identical agreement now which is being offered in evidence?

A. I am sorry, I can't say. I haven't read those yellow papers since they have been offered in evidence here.

Q. Isn't it a fact that the agreement, so far as evidence shows now, by your evidence too, that these sent to Mr. Denson to Los Angeles did not contain any of the riders or interlineations?

Mr. Cooke: I submit this is improper cross-examination with reference to admissibility of a document. All we have to as to that is to show just how the document was made, [589] whether it corresponds to the other documents, does not have anything to do with the admissibility.

The Court: If these yellow paper memoranda were not afterwards incorporated in this contract, for what purpose are they offered?

Mr. Cooke: They are irrelevant here, which is the objection I made to a thousand questions on the same basis, but it seems to me that the plaintiff has been allowed to go into all these preliminary conversations and talks and we want to show now just how the transaction occurred.

The Court: I will admit the document if those yellow papers are omitted.

Mr. Platt: We have no objection your Honor, if the riders and interlineations are omitted, that this go in.

The Court: If the offer is to all of them, the objection will be sustained.

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Cooke: We take exception.

Q. (By Mr. Cooke): You have, while you were on the stand here, examined this Exhibit 1 for identification, have you not?

A. Yes.

Q. And you note the lead pencil interlineations the yellow sheets attached by pins?

A. Yes.

Q. I will ask you to state if you can whether the document, with these yellow sheets attached and the lead pencil interlineations [590] are the same now as they were at the conclusion of the meeting on September 24th in my office?

A. As far as I could state they look the same.

Q. They were taken up more or less item by item and discussed at that meeting, were they not?

A. Yes.

Q. With Mr. Denson?

A. Yes.

Q. And approved by you and he and Charles as we went along?

A. Yes.

Mr. Cooke: We renew the offer.

The Court: The same ruling.

Q. About what time was it when that meeting was adjourned in the afternoon of September 24th?

A. It was early in the afternoon.

Q. I said when it was adjourned, when you finished, when you separated and went out?

A. I wouldn't recall exactly, Mr. Cooke; I would say early in the afternoon, about two o'clock.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. When did you meet there first?

A. Right after lunch.

Q. How long were you there?

A. I would say about an hour.

Q. Did all three of you stay there, with myself, for that full time?

A. Yes.

Q. There was a document introduced in evidence here with your signature on it. Do you remember that? Copy of the draft as finally prepared. Do you know what document I refer to?

A. Yes, the one this morning?

Q. Yes. Do you remember anything about that document?

A. I can't recall.

Q. The next time that you saw or heard from Mr. Denson on this matter of preliminary contract was October 4th, I think you said?

A. When he signed the contract October 4th, yes.

Q. Did you have any communication by telephone or the like prior to that?

A. Yes, Mr. Denson called up and said that he wanted the changes to include the stores.

Q. That is as to the gross income to be calculated on the entire building, including the stores?

A. Including the stores.

Q. That was mentioned by him in the telephone call?

A. In the telephone call.

Q. That call was when with reference to October 4th?

(Testimony of Mrs. Irene Gladys Mapes.)

A. It was as soon, I guess, as he received it, right after the 24th. Some time in there, a day or two later.

Q. State if you recall, whether there was anything said about [592] the entire building, including the stores, being included in this agreement for the purpose of fixing the rental at the conference that was had in my office on the 24th?

A. No, this would exclude the stores.

Q. The talk that we had there?

A. Yes.

Q. The first you knew of his insisting on the stores being included was when he called up?

A. Yes, when he called up?

Q. Something has been said in the testimony about a portion of this conference of September 23rd and 24th being down at your house. That was on Sunday, I think?

A. No, I don't recall it being in my house.

Q. Well, isn't it Mr. Denson's testimony that you were there and I was there and we talked about this agreement down at your house?

A. Yes.

Q. Do you remember of my being there in the afternoon?

A. At that time, no.

Q. Or in the evening or afternoon of the Sunday preceding the day when we met in the office, and I was invited to dinner, do you remember his testifying about that? I am trying to refresh your recollection.

(Testimony of Mrs. Irene Gladys Mapes.)

A. Yes, I recall it and it isn't clear in my mind that you were there that Sunday. I recall you being there on a Sunday [593] but not that Sunday.

Q. Coming on down to October 4, 1945, Mr. Denson came up from Los Angeles or San Francisco?

A. On October 4, 1945.

Q. Did he have any other business, as far as you were concerned, at that time excepting concerning this agreement?

A. No.

Q. And did you talk with him on that date, did you, October 4th?

Q. Where was that talk?

A. Well, it was at the home.

Q. You had a talk in my office also?

A. Yes, we went back to your office later that day.

Q. You first met at your home, did you?

A. Yes, as I recall.

Q. Mr. Denson and you and who else were present, if any one?

A. Charles.

Q. That is all?

A. Yes. You were there.

Q. I am talking about at your home.

A. Oh, at the home?

Q. Yes.

A. This October 4th—you asked if we were all together in the home?

Q. Yes.

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Mr. Denson was there?

A. Yes.

Q. Some of those papers were signed and some were unsigned, is that your recollection of it?

Mr. Platt: Your Honor please, if Mr. Cooke wants to do the testifying he ought to take the witness stand.

Q. What is the fact as to whether all papers were signed that you had for discussion at that time?

A. This paper, the finished paper, you mean?

Q. Did you sign any papers on October 4th?

A. Yes.

Q. Did you sign some yourself?

A. Yes.

Q. Did Mr. Denson sign any?

A. Yes.

Q. How many did you sign, do you remember, duplicates I refer to?

A. Oh, four or more.

Q. There was a change made, according to Mr. Denson's testimony, and I think you have testified the same thing, in the contract that was finally signed up on that day as to the entire building being included?

A. Yes.

Q. And initialed, you remember that?

A. Initialed.

Q. Had you and Mr. Denson agreed, as you understood it, upon the change in the paper before you came up to the office on that date?

(Testimony of Mrs. Irene Gladys Mapes.)

A. No, he came up to have it changed on that date.

Q. I mean had you agreed down at your house on the entire building clause going in there as an amendment before you came to my office?

A. Yes.

Q. Who came to my office in regard to the matter?

A. Mr. Denson, my son Charles, and myself.

Q. And do you remember what discussion, if any, took place at the office in regard to the matter?

A. Yes, it was then in regard to not excluding those stores, to take in the whole floor, was when Mr. Denson said, "Well, this is just a preliminary paper and at a later date we will see that you are taken care of."

Q. Was any discussion with regard to the matter of the entire building being included by an interlineation or the contract rewritten or the like, was that discussed?

A. It was just decided to include it.

Q. How?

A. Well, what would you say when you write it above?

Q. Interlineation? [596]

A. Interlineation.

Q. And initialed too?

A. Initialed too.

Q. To identify it? A. Yes.

Q. And that was done?

(Testimony of Mrs. Irene Gladys Mapes.)

A. That was done.

Q. And then duplicate of that, one or more, was delivered to him and you retained some?

A. Yes, we all received one, Charles received one and I received one.

Q. And what next took place in regard to the matter at that time, do you recall?

A. Well, we left your office and Mr. Denson promised to return shortly after that and get together in a discussion of a lease.

Q. Before you left the office what occurred in regard to Mr. Denson giving you a check for some money, do you recall about that?

A. Oh yes, Mr. Denson took out his check book and wrote a check for ten thousand dollars.

Q. And handed it to you?

A. Yes.

Q. Was anything said at that time in regard to how or when or by whom the other ten thousand was to be paid? [597]

A. No.

Q. Was there anything said at any time as to who was to pay the other ten thousand?

A. No.

Q. You gave him a receipt, which I think counsel presented to you and you already identified it as yours, for the ten thousand?

A. Yes.

Q. Then the next that occurred in regard to the

(Testimony of Mrs. Irene Gladys Mapes.)

hotel transaction after you finished there in my office on this date—what next occurred, let me ask you that way?

A. That same day?

Q. No, we finished with that phase. What next occurred in regard to the matter of the Denson agreement?

A. When Mr. Denson left that afternoon he promised to return shortly after that again to discuss the lease?

Q. Where did he make that promise?

A. Right outside in the street.

Q. Right after you had left the office?

A. Right after we had left the office.

Q. And who were present at the time he made that promise?

A. My son Charles and I were there.

Q. What was it he promised?

A. To return shortly after that and discuss the lease, the terms of the lease. [598]

Q. You say shortly afterward, was any day or week or anything of that kind mentioned?

A. Well, he said he would come back as quickly as he could.

Q. When did he come back, if at all, in the matter?

A. The next time he came back was in January.

Q. Now intermediate that date and September 24th you didn't have any personal meeting with him at all, did you?

A. No, no personal meeting.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. You told us something this morning about a communication, I believe. Did you have any telephone communication with him?

A. Yes, I phoned him in November.

Q. You phoned him?

A. Yes.

Q. Where was he when you phoned him?

A. At Visalia.

Q. And you got him, did you?

A. Yes.

Q. And what did you talk about?

A. Well, I told him that we had started the work on the building and he told me that Mr. Moorehead had phoned him that the elevation plans were ready and that we were ready to start.

Q. You say in November. Can you fix the time more definitely than that? [599]

A. Yes, this was November 26th.

Q. Do you remember that or did you check it with your telephone bill?

A. I checked it with the telephone bill.

Q. You said that you told him that the hotel construction had started?

A. Yes.

Q. And he said that Mr. Moorehead had advised him substantially to the same effect?

A. To the same effect. He had phoned him earlier, before that, I believe around the 19th.

Q. Was there anything else said about the preparation of this lease, who was to prepare it or the like?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I asked him to come up and we would get together on the lease, we would discuss the lease and have it drawn.

Q. What did he say?

A. He said he would.

Q. At the meeting of October 4th you heard Mr. Denson's testimony to the effect that he told me to prepare the lease and he would sign it, or words to that effect?

A. Yes.

Q. Was anything of that kind said?

A. No.

Q. By him or anybody?

A. No. [600]

Q. Going back to this talk of November 26, 1945, just tell us what you said to him by way of requesting he come here to get together on the lease.

A. I told him that we had started construction of the building, that is the demolition and preliminary part, and I asked if he wouldn't come up now and get together and discuss drawing up the lease.

Q. What did he say?

A. He said he would.

Q. Was any time fixed for him to do so?

A. Well, right away. My thought was he would come just as quickly as he could.

Q. I was asking more particularly what was said.

A. He said he would come up as quickly as he could.

Q. No date was set?

A. No date was set.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Those were the words, as you recall it, that he used, that he would come up as quickly as he could?

A. Yes.

Q. At any time did he ever ask that you come down there for the purpose of discussing terms of the lease?

A. No.

Q. Well, did he come up within the week or as quickly as he could?

A. No. [601]

Q. When did he come next?

A. In January.

Q. That I think you told us about, January 26th?

A. Yes, 25th or 26th.

Q. So from November 26th two months intervened until he came?

A. Yes.

Q. Did you have any communication during that two months?

A. Yes, I called him again in December, called him twice in December.

Q. Do you remember when the first call in December was?

A. Yes, December 12th.

Q. Where was he?

A. He was in Visalia.

Q. How do you know it was the 12th? Did you check on it the same way?

A. I checked it; I wouldn't know otherwise.

Q. What was the purpose of making the call on December 12th?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I asked him about coming up, why he didn't come and to come up and get together to draw this lease.

Q. Why was it important for you to press the urgency upon him?

Mr. Platt: Objected to as mere opinion and a conclusion.

Mr. Cooke: I feel she has a right to state, explain, why it was important to her. Her testimony shows she repeatedly urged him to come. [602]

The Court: She may answer the question.

A. Well, I was very anxious to have this lease drawn up. I thought we should have an understanding between Charles and the association.

Q. On a firm basis?

A. Yes.

Q. Well, that was December 12, 1945?

A. Yes.

Q. What did he say in regard to coming up or consummating this transaction?

A. Well at that time he said he would come up. He was negotiating for the sale of his lease on the Johnson Hotel.

Q. That was on the hotel he had at Visalia?

A. Yes.

Q. Did he indicate any time when he would come up?

A. He promised to come up as soon as he could. I would take it that this was sort of demand on me to——

Mr. Platt: (Interrupting) We ask that the answer be stricken.

(Testimony of Mrs. Irene Gladys Mapes.)

The Court: It may go out.

Q. What did he say as to when he would come?

A. He promised to come up right away.

Q. I asked you if he fixed any time?

A. He would come up right away, within a couple of days.

Q. That is all the time he fixed? [603]

A. No, no definite date.

Q. Well, did he come within the several days, or when did he next come?

A. Not until January.

Q. You had another phone communication?

A. On December 27th.

Q. '45?

A. '45.

Q. Did you call him or he call you?

A. I called him.

Q. What did you tell him? What was the purpose or object of the call?

A. Now that Christmas was over I thought we should get together.

Q. Did you tell him that?

A. Yes, and he hadn't come and I wondered why he didn't come.

Q. Is that what you said to him?

A. Yes, and I was anxious to get this lease drawn up.

Q. Was anything said about this agreement between him and Charles at the same time or not?

A. Yes, I asked him about the agreement. I had always—I think in my early testimony today I men-

(Testimony of Mrs. Irene Gladys Mapes.)

tioned the agreement and the lease, to get together on the lease so we could draw the lease.

Q. Is that the substance of what you told him over the phone? [604]

A. Yes.

Q. What did he say in response?

A. He promised to come again.

Q. Just how did he say it?

A. He said he was finishing winding up his negotiations of the hotel. That was the excuse he gave on several occasions.

Q. That hotel refers to his hotel at Visalia?

A. The Johnson Hotel, and that he would come up.

Q. Have you related now the substance of that conversation as nearly as you recall it?

A. Yes. Oh, we discussed about the building going along.

Q. In this same talk?

A. Yes, and we spoke about the demolition.

Q. The next meeting after that I think you told us the next discussion I think you said was January 26th or 27th? A. Yes.

Q. Did you have any further phone talks with Mr. Denson intermediate this date that you just told about and January 26th or 27th?

A. After January 27th?

Q. No.

A. Before?

Q. In between. You told us about the phone talk you first had with him December 27th.

(Testimony of Mrs. Irene Gladys Mapes.)

A. No, not again until he had come in person in [605] January.

Q. And how and why, as far as you know, did he come to Reno January 26th and 27th?

A. I thought he came up——

Mr. Platt: (Interrupting) Well now——

A. (Interrupting) Well, he came, as I understood, to get together on this lease, to draw this lease.

Q. Did you have any communication of any kind with him in regard to his coming up on the 26th or 27th of January?

A. He just came.

Q. And when he just came did he come down to the house? A. Yes.

Q. Did you have any discussion with him there?

A. I asked him if we could get together to draw that lease and that he and Charles get together on their agreement.

Q. What did he say?

A. He told me he had to return back that morning, but he would come back later.

Q. Was there anything said preliminary to your bringing up the matter of the hotel? That didn't just start the very first part of the conversation, did it?

A. Oh no, he was well informed that that was really the beginning of the hotel.

Mr. Platt: I ask that that be stricken.

The Court: It may go out.

Q. What was the first part of the conversation?

(Testimony of Mrs. Irene Gladys Mapes.)

You said, [606] "Qood morning" and shook hands and the like of that?

A. I said, "Now that we have our permit and plans and specifications and all, let us get together and discuss this lease and draw the lease."

Q. That is what you said?

A. Yes.

Q. The permit was for what?

A. To permit starting the real plan.

Q. Of the city authorities of Reno?

A. The city authorities.

Q. And the conversation went from then on, what was the gist of it?

A. Well, he and Charles went over the plans and went down to the office and discussed the plans and checked through, I guess he did, the specifications and went over the work.

Q. They went out for that purpose?

A. Yes.

Q. How long were they gone?

A. Oh, a good part of the day.

Q. You weren't with them?

A. No.

Q. And they returned to the house later on, did they?

A. Yes.

Q. What time did they return?

A. I imagine he had dinner with us that [607] night.

Q. Was the matter of the hotel operations, plans and subject matter discussed that day while you were personally together again?

(Testimony of Mrs. Irene Gladys Mapes.)

A. I can't recall if they were further that day but the next day I asked him—that would be the 26th?

Q. 26th or 27th?

A. The 27th?

Q. He came up then the 26th?

A. He came up the evening of the 24th.

Q. And you asked him then about the lease, and what else was mentioned, anything else?

A. And that he and Charles get together to agree on their agreement.

Q. How did you present that to him? Just how did you say it?

A. Well, I said he had promised to come back from the very start to discuss this agreement and have it drawn up and that we were putting it off and the plans and specifications were ready now, "Let's settle down and get together on this agreement."

Q. That is what you told him?

A. That would be the sense of it.

Q. That is substantially your best recollection, is that right?

A. Yes.

Q. What did he say to that? [608]

A. He said he had to return to Visalia—the sale was still active, and he would come back.

Q. He said the sale was——

A. (Interrupting) He had to wind up the business of the sale.

Q. The same hotel?

A. The same hotel.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Did he say when he had to return?

A. He said that he had to leave immediately.

Q. Did he leave immediately?

A. Yes, he did, that day.

Q. What, if anything, was said about when you would resume the discussion?

A. He was to come back.

Q. What did he say about it?

A. He would come back.

Q. That is what he said?

A. Yes, that he would come back. I don't just recall. It was always that when he would come back it would be as quickly as possible. There is a——

Q. (Interrupting) There wasn't any date mentioned?

A. No, there wasn't any date set but he said he would return within a few days.

Q. Who was present at this talk on the day following beside you and him?

A. On the 26th? [609]

Q. Yes.

A. Charles.

Q. That was the date Mr. Denson left?

A. Yes.

Q. And you and Charles were there at that conversation?

A. Yes.

Q. Anybody else beside you and he and Mr. Denson?

A. No.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. It took place down at your house?

A. Yes.

Q. Now have you told us all that occurred with regard to this hotel subject on this January 24th and 25th occasion? Anything else?

A. I think I said something about plans and specifications there. I told you that. I don't recall right now.

Q. When was the next time that you had any communication with him, either personally or by phone?

A. In March.

Q. What time in March?

A. The 25th, I believe.

Q. Is it true from January 28th to March—

A. (Interrupting) January 26th.

Q. That is my error, January 26th, 1946 to March 25th that you hadn't heard from him at all?

A. No, I hadn't heard from him at all. [610]

Q. Or met him or had any contact with him?

A. No.

Q. Do you know whether Charles had had any meetings with him during that time?

A. I can't recall. No, I don't remember.

Q. Well, on March 25th what occurred then?

A. Mr. Denson called the home and he called for Charles and Charles wasn't there. He said he was very anxious to have—do you want me to tell?

Q. Yes, I asked you what occurred, what did Mr. Denson say?

(Testimony of Mrs. Irene Gladys Mapes.)

A. He said that he was very anxious to have Charles come down to Los Angeles and meet with this decorator.

Q. How was that all brought about, who called who?

A. Mr. Denson called Charles.

Q. And you answered the phone?

A. Yes.

Q. Was Charles there at the time?

A. No, Charles wasn't there.

Q. He was still in service?

A. No, he was out of service. He was at home that time but he wasn't there. I said that he would be there later and I recall becoming very angry with him at that time——

Q. (Interrupting) That isn't responsive to the question. Something was said here by both you and Mr. Denson about the length of the telephone call, eight minutes. Was this the one? [611]

A. Yes.

Q. March 25th?

A. March 25th, that is the one I am referring to, that lengthy one, and Mr. Denson said it was March 25th.

Q. And he called Charles?

A. Yes.

Q. And you answered? A. Yes.

Q. And you proceeded to go ahead and talk?

A. Yes.

Q. And beside he said he wanted Charles to come

(Testimony of Mrs. Irene Gladys Mapes.)
down to Los Angeles, what was said during this 8-minute time about the proposed lease?

A. I asked if he wasn't getting the cart before the horse, that he was supposed to come here and get together in drawing up a lease and now we were into decorations, wasn't that getting the cart before the horse. I told him how he was here on January 25th and 26th and promised to come back. He hadn't returned, and he said at that time that the preliminary agreement had expired and that that didn't have any meaning as far as its function was concerned.

Q. What preliminary agreement are you referring to?

A. The one dated September 24, 1945.

Q. '45?

A. 1945. [612]

Q. Anything further, Mrs. Mapes?

A. I asked him after that, even after that, wouldn't he get together with us.

Q. This is part of the same talk now, is it?

A. Yes.

Q. What did he say in reply?

A. He said he would.

Q. I would like you to state the entire conversation.

A. He said he wanted to talk with Charles first, he would call him again tomorrow night, that he was very anxious for him to meet with this decorator and I asked him wouldn't he get together with us on this drawing up of the lease and agreement and he said he would.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. No time was fixed for getting together any more than that?

A. No, he was calling the next night to talk with Charles.

Q. Which one of these several meetings was it that he was indisposed and ill, do you remember that?

A. I don't remember.

Q. Well, have you told us now in substance all you recall that was said by you and by him at this March 25, 1946 talk, this eight-minute talk?

A. Oh, there was quite a lot of discussion, There was argument——

Mr. Platt: I ask that that be stricken, your Honor.

The Court: Just what was said? [613]

Q. Was anything more said?

A. No.

Q. This statement of yours of the cart before the horse, I take it had reference to the decorations before you had definite plans on the building?

A. Yes.

Q. Do you know anything about he and Charles having a meeting shortly after March 25th?

A. Yes, they had a meeting April 1st.

Q. You weren't there?

A. No.

Q. All that you know about that is what was reported to you afterward?

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. You know Charles left home?

A. Yes.

Q. He was gone for several days?

A. Well, two or three days, yes.

Q. And the next meeting with Mr. Denson, if I have the chronology of this right, was about April 10th?

A. Yes.

Q. At that meeting what, if anything, was said by Mr. Denson about having a meeting with Charles on the 1st of April? Was that discussed or mentioned in any way?

A. No, not while I was there. [614]

Q. Weren't you there during the entire meeting?

A. No, I wasn't there during the entire meeting.

Q. I think you told us you had to go out on some social errand?

A. Yes.

Q. Mr. Denson came to the house?

A. Mr. Denson came. I think his appointment was for ten o'clock and my appointment was for ten. As soon as the meeting took up, I asked if I could give my report and be excused.

Q. The meeting, you mean with Charles?

A. No, the 20th Century Club. I am a director.

Q. Let me find out if any business was transacted or discussed about the lease with Mr. Denson before you went to the 20th Century Club?

A. I wasn't there when he arrived.

Q. And when you came back he was there?

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. What time did you come back?

A. I would say just before eleven, just as quickly as I could. I couldn't be accurate on that.

Q. Who was there when you came back, who was present?

A. My brother was there, my only brother, Mr. Hall, and my son Charles, Mr. Denson and myself.

Q. How soon after you arrived did the subject of this lease, this agreement, or whatever it was, the subject of the [615] hotel come up?

A. Very shortly after I came. I think I commented I was out minding somebody else's business, I didn't have enough of my own business to attend to, had to mind some one else's business. When I came in I apologized for being late and then Mr. Denson started to talk.

Q. What did he say, the substance of it?

A. He said, "Mrs. Mapes, you agreed to build me a hotel and after agreeing to build this you begged me to take your son, Charles, in in association; in consideration of you I accepted Charles without looking into his ability or background.

Q. You are repeating what he said as nearly as you can?

A. As nearly as I can, the sense of it. And he said, "Now Charles refuses to enter into a lease with me. I have a binding contract and I propose to have it stick." You know, have it stand. He said, "If Charles won't enter into a lease with me, I am ready and able to enter into one myself, accept one myself." That is the sense of it.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Did he say that right along without interruption?

A. Oh, it just came right out in one breath, continuous.

Q. What I am getting at, neither you nor Charles made any reply during the time he made any statement?

A. I was shocked; no, I couldn't.

Q. You did finally make a reply?

A. Yes. [616]

Q. You told us about that this morning, I believe, on cross-examination?

A. Yes. I was upset when he told me I begged him to take my son in, because this was all set up for my son.

Q. Well, along that subject, I might ask you if there is any truth in it whatever that you ever begged or solicited him to take your son?

A. From the very start it was my son's hotel to decide what was to be done.

Q. Did you ever directly or indirectly, by innuendo or intimation of any kind, tell him that you were building a hotel for him, Mr. Denson?

A. No.

Q. You heard his testimony?

A. Yes.

Mr. Platt: I submit, if the Court please, that is deduction drawn by counsel and the question isn't justified from the evidence and I ask that the answer be stricken.

(Testimony of Mrs. Irene Gladys Mapes.)

The Court: It seems to me that the witness brought out testimony. She said this morning to the effect that Mr. Denson said she had promised to build a hotel for him. Now Mr. Cooke asked her if she ever did promise to build a hotel for him. Objection will be overruled. What is the answer to the question? [617] A. No.

Q. You told us in your testimony this morning something about the hotel being built especially and primarily for your son and that Gloria was to have an interest in the proceeds in some way?

A. Yes.

Q. How long had that been in contemplation?

A. Oh well, that was a great many years before, six years before or something like that.

Q. Was it in contemplation at the time you and your husband acquired it?

A. Yes, my husband's idea was it was always to be a hotel and Charles was to benefit by it and Gloria was too.

Q. That was upon every conversation with Mr. Denson?

A. I always stressed the fact that it was my husband's idea and I was carrying out his wishes. I think I stated it to many people, not only Mr. Denson.

Q. During this talk on April 10, 1946, you mentioned names of certain persons present there. Was Gloria present during that conversation?

A. No.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. Was she present at any of the conversations in which this hotel lease subject was discussed between you and Mr. Denson?

A. No. [618]

Q. She was present at some meeting held down in the Fielding Hotel, I think you told us, or the Sir Francis Drake?

A. That meeting was the day after V-J Day?

Q. Yes. A. Yes.

Q. The subject of the lease wasn't discussed at that time?

A. No.

Q. Counsel asked you this morning whether you had ever offered a lease or a form of lease on that property to Mr. Denson for his signature and you answered no.

A. No.

Q. Did Mr. Denson ever offer you any form of lease for your signature? A. No.

Q. Nobody had any form of lease, did they, I mean between you and him?

A. No.

Q. This meeting that was mentioned in September, September 24, 1945, document that is to be held and discussion had as to terms and conditions of the 20-year lease to be agreed upon, if you could, was any such meeting ever had?

A. No.

Q. From the time that that paper was signed on October 4th, finally executed on October 4, 1945,

(Testimony of Mrs. Irene Gladys Mapes.)

down to about April 10, 1946, what was your attitude as to whether you would meet [619] with Mr. Denson and discuss terms of the lease?

A. I was very anxious to meet with him and had asked him several times to meet with me.

Q. When you learned that your son Charles and Mr. Denson couldn't get together, or wouldn't get together, what, if any, effect did that have upon your attitude in regard to a lease with Mr. Denson?

A. Was that the final when I learned that he couldn't get together?

Q. Yes.

A. Of course, I was interested in a lease with my son and Mr. Denson to be associated.

Q. Well, what I am trying to find out is what effect did the fact that you learned that your son and Mr. Denson couldn't or wouldn't agree between themselves to operate that hotel, what effect did that have upon you in regard to signing a lease with Mr. Denson alone?

A. Oh never would I ever thought of signing a lease with Mr. Denson alone. It was my son whom I was interested in seeing this building erected for. We were putting all our finances and backing into it for my son.

Q. At the time on April 10th when Mr. Denson told you that you had promised to build him a hotel and begged him to take your son in, you made the reply that you told us about this morning?

A. Yes. I had never heard of that. He gave me that talk and [620] I was shocked, that I had to

(Testimony of Mrs. Irene Gladys Mapes.)

beg him to take my son, and as I say I think it was the mother that rose in me. I couldn't think of anything else and I only thought of my love for my children——

Q. (Interrupting) The point I am trying to get at, Mrs. Mapes, after you learned that, that ended your interest in any lease with Mr. Denson?

A. Absolutely. I turned to him and I said, "Now it is all very clear why we never could get together on this lease; that explains it."

Q. At that time was anything said about agreement between Charles and Mr. Denson in regard to division of the proceeds?

A. No.

Q. That was discussed previously and you were present at one time, I think you told us?

A. Earlier we discussed it, but not at that time in connection with this final.

Q. Nothing was said at that time?

A. No, there was nothing said.

(Short Recess)

MRS. MAPES

resumes the witness stand.

Mr. Cooke: I think that is all of the examination of Mrs. Mapes at this time. [621]

Recross-examination

By Mr. Platt:

Q. Mrs. Mapes, I call your attention to the agreement that has been dated 24th day of Septem-

(Testimony of Mrs. Irene Gladys Mapes.)

ber, 1945, between you and Charles W. Mapes, Jr., and Mr. Denson, in evidence as Plaintiff's Exhibit "C", which you have already testified you signed?

A. Yes.

Q. Now in this agreement there is a provision, and particularly Section 1 thereof, which reads as follows: "That in consideration of the premises and for other valuable and sufficient consideration present and received, receipt whereof is hereby mutually acknowledged by the parties, that contemporaneously with the execution and delivery hereof, the second parties shall deposit with the first party * * *" whom do you understand to be the second parties?

A. Mr. Denson and my son.

Q. And whom do you understand to be the first party?

A. I am supposed to be the first party. I am.

Q. " * * that the second parties shall deposit with the first party * * *", that is you?

A. Yes.

Q. " * * the sum of \$20,000 in cash as a guaranty of their good faith and by way of inducement for the first party to enter into this agreement." [622]

A. Yes.

Q. Now do you understand by that Mr. Denson, one of the second parties, is obligated to deposit with you, the first party, ten thousand dollars and that your son, the other second party, was obligated to deposit with you an equal amount?

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Cooke: I object to that as asking the witness for construction of the agreement. It is a written agreement, it is in evidence, and what her understanding is is immaterial if it isn't the same as the written document.

Mr. Platt: If the Court please, in the light of this cross-examination of this witness, if Mr. Cooke will concede that this is a reasonable and proper interpretation of this agreement, I will withdraw the question.

Mr. Cooke: I do not know what you mean, a proper interpretation.

Mr. Platt: That Charles W. Mapes, Jr. in accordance with section 1 of that agreement, shall deposit with Mrs. Mapes the sum of ten thousand dollars and that Mr. Denson shall deposit an equal amount.

Mr. Cooke: That is a peculiar request to make. I am simply objecting that the document be allowed to speak for itself without regard to what Mrs. Mapes understood or what Mr. Denson or Charles W. Mapes understood about it. That is not what courts are for, to take testimony of Tom, Dick and Harry as to understanding of a written agreement, but it is an agreement signed by the parties and no question about [623] being any fraud or mistake, that must speak for itself.

The Court: However, Mr. Cooke, the question of whether or not the plaintiff, by failure to exercise his privileges under this contract within a certain period of time, and whether or not the parties con-

(Testimony of Mrs. Irene Gladys Mapes.)

sidered that he had, in a sense, defaulted, wouldn't that be colored in some way or be affected in some way by an understanding on the part of Mrs. Mapes as to whether or not he was to pay ten thousand dollars or twenty thousand dollars? For instance, if she thought that he was to pay twenty thousand dollars and hadn't paid it, the recourse she would take might or might not be different from that that actually occurred after the signing of this contract.

Mr. Cooke: My answer to that would be that she is bound by the written agreement. If that said ten thousand dollars paid by one——

The Court: (Interrupting) Objection overruled. Answer the question.

A. My answer is no.

Q. Your answer is no?

A. That each one is supposed to deposit ten thousand dollars apiece, that is the question? [624]

Q. Yes.

A. My answer is no.

Q. Well, your answer being no, how did you understand Section 1 of this agreement to which I have called your attention?

Mr. Cooke: We wish to interpose an objection, the contract is the best evidence; that this is an attempt to violate the rule against varying the terms of a written agreement by oral testimony.

The Court: The Court agrees with the proposition that it is not for a witness to interpret provisions of a contract, but for the purpose of getting an

(Testimony of Mrs. Irene Gladys Mapes.)
understanding or explanation of the contract, where Mrs. Mapes is one of the parties to this contract, subsequent to its being executed, I think we have a right to know how she felt about it along those lines, and the objection will be overruled.

(Question read.)

A. That I was to receive twenty thousand dollars on the execution of this agreement.

Q. Who was to pay the twenty thousand?

Mr. Cooke: Same objection, your Honor.

The Court: Same ruling.

A. I don't think it was ever discussed, Mr. Platt. I wouldn't know. [625]

Q. I am not asking you about a discussion. I am asking about your understanding. You just said your understanding was that you were to be paid \$20,000.

A. Yes.

Q. I take it upon signing of this contract. Now how much was Mr. Mapes, your son, to pay, according to your understanding, and how much was Mr. Denson to pay?

A. I don't know. I didn't understand what either one were supposed to pay.

Q. Well, was it your understanding that Mr. Denson should pay any greater amount than your son, Mrs. Mapes?

Mr. Cooke: Same objection.

A. No, I wouldn't know.

(Testimony of Mrs. Irene Gladys Mapes.)

The Court: I don't know, that might get away from the thought we had in mind here.

Mr. Platt: Your Honor please, I can explain our position very briefly, if there is any question in your Honor's mind.

The Court: You may do so, Mr. Platt.

Mr. Platt: Because of the testimony given by this witness, it has been in effect testified to by her that Charles Mapes was to have a 70% interest and that Mr. Denson was to have a 30% interest and these are two reasons why that couldn't be a construction of this contract. One is that the agreement in effect establishes that both of them [626] were to pay twenty thousand dollars and the only inference is that they were taking an equal interest in this contract, so that the inference is very plain that if, according to Mrs. Mapes' testimony, Charles Mapes was to receive 70 per cent interest and Mr. Denson was to receive 30 per cent interest, it would certainly be an extraordinary and unusual thing that Mr. Mapes would not be required to pay more as a deposit than Mr. Denson, and if your Honor will read that contract, which your Honor undoubtedly has—and I am just endeavoring to refresh our recollection—you will find that there is an equal liability upon the part of Mr. Denson and upon the part of Mr. Mapes, not only in purchasing of furniture and equipment and accessories, but an equal liability in the execution of a chattel mortgage by both of them as guaranty to Mrs. Mapes for the payment of the debt, and of course from that record itself—I am

(Testimony of Mrs. Irene Gladys Mapes.)

only referring now to the question I asked and I expect to ask another one—but from that record itself, that contract itself, as far as we have proceeded the testimony of Mrs. Mapes can not be taken as testimony in accordance with the written agreement as entered into, but with the general understanding between the parties.

The Court: Read the question.

(Question read.)

Mr. Cooke: I would like to be heard.

The Court: You may do so. [627]

Mr. Cooke: I do not think that the argument made by Mr. Platt reaches the legal point. That might be addressed to a jury or the court on final hearing, final argument, as to just what the parties intended, etc., but here he is asking Mrs. Mapes what she understood by this agreement. I can't see any legal basis for that kind of a question. She would be bound by the agreement, she couldn't excuse herself if she intended to do something that she should not have done under the agreement, she could not come in and tell Mr. Platt: "I understand the agreement is so and so and that is my excuse." She would be held by that agreement and if she misunderstood it, didn't comprehend it correctly, that would be just her bad luck. Well, the same principle would apply on this, as I see it. The fact that she may have one understanding, whether correct or incorrect, is immaterial. She is responsible for the

(Testimony of Mrs. Irene Gladys Mapes.)

legal consequences if she has complied with the agreement, and if she has not complied with it, she is equally responsible. Now the fact that she has testified that there was a talk between Mr. Denson and Mr. Charles W. Mapes about 30 per cent and 70 per cent division does not, to my mind, bear upon this question at all. There is nothing about that that necessarily means there must be an equal liability all the way through. I know of partnerships, for instance, where a man goes into partnership and he pays a large price for a comparatively small interest. The matter of what it costs him to get in is not [628] any conclusive circumstance or fact as to how the profits are to be divided. We have partnerships where there is an old established concern and some new man comes in and wants to get in and he is willing to do almost anything to get in and that may be the case with Mr. Denson. He was willing to do almost anything to get in this hotel, there is plenty of evidence to indicate that, but if he agrees on the 70-30 division of profits perhaps that is his reason for it and if that is his reason, it has nothing to do with the question that everything must be equal, that because he is going to stand equally on the cost of furniture, etc., that he must necessarily have a 50-50 division, so I say this is going far afield from the issues in the case and can not be of any possible fundamental value and certainly is asking a lot of a witness what she understood as to this and expect the Court to give any effect to that understanding.

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Platt: If your Honor has any doubt about it, I would like to be heard briefly again.

The Court: Well, there is a provision in the contract that time is of the essence of it. Then in paragraph of the numbered paragraphs there is a recitation there that the second parties shall deposit with the first party the sum of twenty thousand dollars in cash as guaranty of their good faith and by way of inducement for [629] the first party to enter into this contract. I suppose this consideration would apply to that paragraph if that deposit had not been made within reasonable time or time provided in the contract. Isn't there something in here——

Mr. Cooke: Yes, at the time the contract is executed and delivered—"contemporaneously with the execution and delivery hereof."

The Court: What were you going to say, Mr. Platt?

Mr. Platt: I was just going to say, as I suggested to counsel, it seems to me in all fairness there should be either one or another position taken. Counsel insists that the contract is in writing and that is the way it should be interpreted. All right. But on the other hand, instead of leaving it to interpretation of the contract, his client testifies that the contract should not be interpreted as written that the understanding was that Charles Mapes was to have a 70 per cent interest and Mr. Denson have a 30 per cent interest, and you can't find any suggestion of anything like that in that contract.

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Cooke: Or anything against it.

Mr. Platt: In any event, if the Court please, they ought to make their position clear and the only way we can meet this testimony is to call the witness' attention to the [630] nature and character of the contract and what she understood when that money was accepted. My attention has been called to paragraph (b) of the Answer on page 15, which reads that "the twenty thousand dollars so required by paragraph 1 of said Exhibit A to be deposited by Charles W. Mapes, Jr., and the plaintiff, P. G. Denson, as guaranty of their good faith, was not deposited contemporaneously with the making of said Exhibit A or at all, except ten thousand dollars was deposited on or about October 4, 1945, but the remaining ten thousand dollars has never been deposited or tendered to the said defendant, Mrs. Charles Mapes," and I say, if the Court please, that allegation of that answer itself shows that the understanding was that Charles Mapes was to put up ten thousand dollars, an equal amount with Mr. Denson, and that they were to have an equal interest in this contract.

The Court: The objection will be overruled. You may answer the question.

(Question read.)

A. No.

Q. As I understand your testimony, Mrs. Mapes, if I can boil it down, the fact that a lease was not

(Testimony of Mrs. Irene Gladys Mapes.)

signed between you and your son and Mr. Denson was because, first, you had not persuaded Mr. Denson to confer with you leading up to the execution of the lease, and secondly that you desired your son [631] and Mr. Denson to get together on some signed agreement to determine how much each would share in the lease. Now without asking you many many questions, have I stated the substance of your testimony fairly?

Mr. Cooke: I would like to have that question read. It is pretty long. It may be I want to make an objection.

(Question read.)

Mr. Cooke: Our objection to the question is, it is what counsel understands of the testimony. I know that is done more or less by counsel and think I do it more or less myself, but I am satisfied it is contrary to examination to ask a witness what an attorney understands, and that is what this is here. Mrs. Mapes can't testify to what counsel understands.

The Court: I think it is reframing the witness's testimony, what has been testified on that in one question. The objection is overruled. Answer the question, if Mrs. Mapes understands the question.

Mr. Platt: I will try to clarify it, your Honor.

The Court: We will take a recess until tomorrow morning at 10:00 o'clock. Recess in this case until 10:30.

(Recess taken at 4:10 p.m.)

(Testimony of Mrs. Irene Gladys Mapes.)

Thursday, December 12, 1946, 10:30 a.m.

Appearances as at previous sessions.

Mrs. Mapes resumed the witness stand on further examination by Mr. Platt.

Mr. Platt: As I recall, your Honor, I had asked Mrs. Mapes a question just before we adjourned.

(Question read.)

The Court: Do you still feel——

Q. Well, Mrs. Mapes, attempting to shorten and clarify the question, do I understand that you were always ready and willing to sign a lease if and when Mr. Denson and Charles could get together on the proportion which you believe they were to share?

A. Not to that sense, Mr. Platt. I thought it was necessary for them to get together on an agreement so it would be set up in a businesslike way and that there wouldn't be any squabbling after they started. The hotel operation was started. I don't think I said in any part of my testimony——

Q. Well then am I to understand that you were always ready and willing to sign a lease, providing your son Charles and Mr. Denson could get together in a business way?

A. That was never definitely settled. It was understood they would agree upon their business association and from there would go into agreement on the lease. That was understood before we signed this paper. [633]

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Platt: Well, I ask the part of the answer that it was understood be stricken.

The Court: Doesn't the question call for understanding?

(Question read.)

The Court: Motion will be granted. It may be stricken.

(Question read.)

A. Yes, I would want to say that I always understood that we were to agree on this agreement, then draw up a lease.

Q. And then your testimony is if they could get together in a business way you were ready to sign the lease and that was the only thing you were waiting for?

A. No. I thought they should both get together. It was my understanding that we would agree, that I was to understand what the management would be of the lease I would have to draw, who was going to be manager, how it was going to be set up. If I can explain at this time, that this preliminary agreement was purely Mr. Denson's idea. I signed that agreement with the thought that provided terms, conditions and details could be mutually agreed upon and on its face I thought the agreement was a preliminary agreement, it was a preliminary agreement. To my notion all of this was preliminary, to get together to really agree to agree.

Q. Well, did you also understand that in the

(Testimony of Mrs. Irene Gladys Mapes.)

event Mr. Denson [634] did not comply with the terms and conditions and covenants of the preliminary agreement, as you call it, that you keep the ten thousand dollars?

A. No, I wouldn't. If for any reason we couldn't agree, I would never keep his ten thousand dollars. I didn't know as he was to put up ten thousand dollars, Mr. Platt.

Q. You didn't even know that?

A. No. There was \$20,000 to be deposited. Who was to put it up was never decided on. I would never keep any one's money unlawfully or in any way.

Q. At least you did keep his ten thousand dollars.

A. Has he ever asked me for it please?

Q. I am asking you the question.

A. I have it.

Q. And he put it up on October 4th and you have kept it since? A. Yes.

Q. I want to clear up, if I can, another little matter. I understood you to testify that Mr. Denson was in Reno some time during the latter part of December, 1945, and upon that occasion you and he interviewed Mr. Hopper with respect to the 12-foot strip. Aren't you mistaken as to the date, Mrs. Mapes? Isn't it a fact that you and Mr. Denson interviewed Mr. Hopper a month later, namely about the 25th of January, 1946?

A. I thought that was in September I said. I

(Testimony of Mrs. Irene Gladys Mapes.)

don't definitely [635] recall. I told you the letter I had received from Mr. Gock in connection with it was in December. I don't know that I clearly have the time or recollection in my mind.

Q. Well, to the best of your recollection, is it a fact or isn't it a fact that you and Mr. Denson interviewed Mr. Hopper the afternoon of January 25, 1946, with respect to your desire to have the City Council give you the 12-foot strip which you desired for hotel purposes?

A. I interviewed Mr. Hopper. I recall my interview with Mr. Hopper and what date I couldn't tell you that.

Q. You couldn't tell me?

A. No, I am sorry.

Q. Well, isn't it a further fact that after this interview with Mr. Hopper that you and Mr. Denson, at your instance and request, went to the University to see a painting?

Mr. Cooke: Objected to. It is wholly immaterial.

The Court: It seems to be immaterial, unless it is used for the purpose of refreshing her memory.

Mr. Platt: That is right.

The Court: Objection overruled.

A. I don't know. I know that we went. I couldn't say right now when I had that portrait painted. I would have to go back and check back. Those things are not in my mind.

Q. In any event, you recall that you took Mr. Denson up to the University for that purpose?

A. Yes.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. And it was while that portrait was being painted?

A. I wouldn't connect the two. I would like to stop there.

Q. But your answer is you do not know whether it was December or January that you went to interview Mr. Hopper?

A. No, I thought I said September. I didn't say December. I thought I said September. I really thought it was earlier. I didn't say December, I am certain. If I did, I was mistaken because I thought I said September.

Q. Well, do you know whether Mr. Denson was here in September, 1945? A. Yes.

Q. Well, that was before the signing of the contract, wasn't it? A. Yes.

Q. And you are certain, aren't you at least, that Mr. Denson didn't interview Mr. Hopper until after the contract was signed?

A. I was thinking it was September. We have had so many interviews on that 12-foot strip and I have had so many people try to help me to get that 12-foot strip. I think it was in regard to Mr. Gock's letter. I don't recall definitely and if I misunderstood the dates, I don't think it was intentional on my part. I am most certain I said September and if it was misunderstood, that was my thought. It was before the signing [637] of this agreement.

Q. Isn't it a fact, Mrs. Mapes, that Mr. Denson visited you at your home on the 25th of January, 1946, and that you discussed with him the question

(Testimony of Mrs. Irene Gladys Mapes.)

of the 12-foot strip and he told you that he was going to see Mr. Hopper and you requested that you go along and Mr. Denson then said, "No, I would like to see Mr. Hopper alone first" and then he came back to your home and then in the afternoon you and he went to interview Mr. Hopper, and that was the afternoon of January 25, 1946?

Mr. Cooke: Objected to as immaterial.

The Court: Objection overruled.

Mr. Cooke: Does not prove any issue in the case.

The Court: You may answer the question.

A. No, it is not a fact.

Q. It is not a fact?

A. No, not those conditions, that he said he wanted to go on his own to see Mr. Hopper.

Mr. Platt: I think that is all, your Honor.

The Court: Any further questions, Mr. Cooke?

Examination

By Mr. Cooke:

Q. You answered counsel for the plaintiff on his examination just closed several questions about whether you were willing to sign a lease until your son and Mr. Denson had agreed upon something as between themselves. What lease did you have in mind? [638]

A. That we were to get together to see if we could agree upon a lease on the hotel.

Q. Did you ever discuss with Mr. Denson since September 24, 1945, the details and conditions and

(Testimony of Mrs. Irene Gladys Mapes.)

terms that should go into the lease, other than as set forth in the September 24th agreement?

A. No.

Q. Was the subject, for instance, of whether the lease, if it was made, was to be assignable, was that discussed?

A. Oh yes, that was a very important factor. Before this preliminary paper was signed that was why really Mr. Denson had come up to get together on this association agreement, business agreement, and it was understood at that time that, due to the fact and looking at things as things are, Mr. Denson being the older one of the two, that he would naturally pass upon conditions first.

Q. When and where was that discussion, Mrs. Mapes?

A. In our living room at home.

Q. And when?

A. That Sunday.

Q. What do you mean by "that Sunday"?

A. I would want to say the 23rd. That Saturday night, the 22nd it was, I believe, it was, if that is a Saturday night.

Q. The Saturday preceding the Monday when the meeting was held in my office and the paper was prepared, September 24th? [639]

A. Yes.

Mr. Platt: I submit, your Honor, my recollection is that that meeting in Mr. Cooke's office was held on Sunday.

A. This was another meeting I believe Mr. Cooke was speaking of.

Mr. Cooke: There was no meeting held in my office on Sunday in connection with this matter.

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Platt: You are referring to the meeting of September, 1945?

Mr. Cooke: Yes.

Mr. Platt: What date in September?

Mr. Cooke: 24th. That is on Monday.

Mr. Platt: I beg your Honor's pardon.

Q. Who was present when the matter was discussed as you stated?

A. Mr. Denson, my son Charles and myself.

Q. Who brought the subject up?

A. What subject?

Q. Who brought it up that Mr. Denson, being the older man and that you have some protection against some of his heirs coming into the lease?

A. My son.

Q. Do you recall what he said?

A. He said he thoroughly wanted it understood that this interest in this lease couldn't pass in case of his death. [640]

Q. Whose interest?

A. Mr. Denson's interest. That at that time it should not pass to the heirs.

Q. What heirs?

A. Mr. Denson's heirs. I think the reason my son said that he just didn't want any one in there connected with him.

Q. That isn't responsive. I asked you what was said?

A. I think he said that.

Q. You think he said that?

A. I know he said that.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. He didn't want strangers coming in?

A. Didn't want some strangers coming in.

Q. Do you remember what Mr. Denson said about that?

A. It was agreeable.

Q. What did he say?

A. That was all right.

Q. Were there any other details of the proposed lease different from what was discussed, that was mentioned at that meeting?

A. Yes, the percentages; what part Mr. Denson would have and what part my son would have.

Q. They went into the document that was drawn on the following Monday, the percentages?

A. No, the 30 per cent and 70 per cent.

Q. That was between your son and Mr. Denson?

A. Yes.

Q. I am talking about the lease arrangement between you and Mr. Denson. Was anything further discussed? You already told us about the agreement not being assignable.

Mr. Platt: I submit if the witness did not understand the question that she say so. Instead we have another different matter. The question is not responsive, I ask that it be stricken.

Q. I ask you the question again——

Mr. Platt (Interrupting): I make the motion.

The Court: Motion denied.

(Question read.)

A. There wasn't a discussion on drawing the lease that night at all, Mr. Cooke.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. But this one subject you have mentioned about not being transferable or assignable, did that relate to the lease or between your son and Mr. Denson?

A. Between my son and Mr. Denson. Mr. Denson came up to my home to get together with Charles so we could get together on agreement of the association. That was the intent and purpose of his coming here.

Q. So when you talk about the discussion as to the arrangement or agreement not being assignable or transferable in case of the death of Mr. Denson, an older man, etc., you had reference to a partnership agreement between him and your son? [642]

A. Yes.

Q. And not to the lease?

A. No, that was not discussed.

Q. Then it is correct to say that the details of the proposed lease, outside of what was stated upon the face of the document that was prepared the following Monday, were not discussed by you and Mr. Denson at any time? A. No.

Q. Counsel asked you about the ten thousand dollars that had been paid. Have you taken any steps to tender that back or offer the tender of it back prior to this suit being commenced?

A. Prior to the suit—yes, I offered it back April 10th. That is prior to this suit.

Q. You didn't do it personally?

A. No, through my attorney.

Q. You caused it to be done?

(Testimony of Mrs. Irene Gladys Mapes.)

A. Yes, I talked with Charles and he said he didn't want to go on with the lease and I said, I told you we should return that ten thousand dollars to Mr. Denson.

Q. You refer to this 12-foot strip here and the city giving you that strip. That wasn't any gift from the city that was contemplated? You use the term "gift."

A. That is a long story, but I would like to say that the city led me to believe that we could purchase that 12-foot strip. [643]

Q. I don't care about that. You were on a deal with the city where you were trying to buy it for a good round price, isn't that correct?

A. A good price. I think we have the same type as you had at Grey Reid Wright's.

Q. Counsel asked you a number of questions about September and December incident of Mr. Denson being here and so on. I understood you yesterday to testify that Mr. Denson was not here at all between September 24, 1945 and January 25, 1946. Is that right or not?

A. Yes, I asked his Honor if I could correct a mistake I had made and he permitted me to do so. I did say the day before I thought he was here in December.

The Court: I remember your asking that permission.

Q. What correction do you want to make?

A. I think in my first day's testimony I thought

(Testimony of Mrs. Irene Gladys Mapes.)

Mr. Denson was here in the latter part of November or the first part of December.

Q. That is what you want to correct?

A. I wanted it corrected.

Q. What is correct?

A. Mr. Denson was not here until January.

Q. So it is a fact then that he was not here from September 24th down to January 25th, the following January, is that right? [644]

A. Yes.

Q. Was it a fact that Mr. Denson wanted to see Mr. Hopper first on this occasion when he planned to go down there? Was there anything said by Mr. Denson at that time about his wanting to see Mr. Hopper before you went in?

A. No. I think I explained to Mr. Denson that I understood the difficulty, one part of the difficulty, getting this 12-foot strip was the objection of the adjoining property owner——

Q. (Interrupting): But what I wanted to know, Mrs. Mapes, is what was said between you and Mr. Denson preparatory to going to Mr. Hopper?

A. I think I asked him to go with me, as I recall.

Q. Any reason stated by you why you wanted him to go?

A. I asked him to go that he might express Mr. Gock's wishes in the matter.

Q. What did he say to that?

A. He was agreeable.

(Testimony of Mrs. Irene Gladys Mapes.)

Q. And you went together?

A. Yes, went together.

Q. And had the conference with Mr. Hopper?

A. Had the conference.

Q. That conference, I think you told us now, was in January.

A. It has definitely been put in January. I wouldn't mean to swear to anything.

Q. What is your best recollection about it? [645]

A. I don't know. I would have to have somebody else tell you about that.

Q. It might be January or September?

A. It might be any date. I would have to be told.

Q. You have no way of fixing it?

A. I have no way of fixing it.

Mr. Cooke: That is all.

Mr. Platt: We have no further questions, your Honor.

CHARLES W. MAPES, JR.

one of the defendants, called as as adverse witness, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Platt:

Q. Mr. Mapes, you are Charles W. Mapes, Jr., one of the defendants? A. I am.

Q. You are the son of Mrs. Charles W. Mapes, another defendant? A. Yes sir.

(Testimony of Charles W. Mapes, Jr.)

Q. And the brother of Gloria Mapes, another defendant? A. Yes sir.

Q. Are you acquainted with Peter G. Denson, the plaintiff in this action? A. Yes, I am.

Q. Do you recall when you first met him?

A. I believe I met Mr. Denson some time in the fall of 1944.

Q. Where did you meet him?

A. At my home in Reno.

Q. Do you remember who were present at that meeting?

A. I think my mother and Mr. Denson and myself.

Q. Do you know the purpose or object of his visit?

A. No. I was in the navy at that time and I had a week-end leave. I just came off the *plan* and met Mr. Denson, merely a social visit. He kidded me about being in the navy and mentioned [647] he had been in the army himself in World War I. It was a friendly visit at that time is all I recall.

Q. Do you recall when you met him again?

A. I think I met Mr. Denson the next time at the Hotel Sir Francis Drake in San Francisco.

Q. About when was that?

A. That was on V-J Day.

Q. And where in the Sir Francis Drake did you meet him?

A. I think I met him first in the lobby of the

(Testimony of Charles W. Mapes, Jr.)

hotel and later on either at his room or our room, later on that night.

Q. Do you recall who were present at that meeting?

A. It wouldn't be any meeting. It was just a get together. I think there were Mr. Denson, Mrs. Denson, mother, Gloria, and myself.

Q. Was there anything done or discussed in a business way during that meeting?

A. Not that evening. It was V-J Day and the army and navy were there in San Francisco. Everybody was happy that the war was over; more or less expressing our happiness that the war was over.

Q. Well, you were socializing on that occasion?

A. Yes, you might call it that.

Q. And did you meet Mr. Denson the next day in San Francisco?

A. No, I was confined to my base after the celebration in San Francisco. [648]

Q. When did you meet him again?

A. I believe it was a short time after.

Q. When is that?

A. I didn't meet him during the day and I believe it was a few hours that night, the following day, the 15th or 16th, the day after V-J Day.

Q. And upon the following day, the 15th or 16th, who were present at that meeting?

A. I met with Mr. Denson alone, just the two of us, in the mezzanine.

Q. Where did you meet with him?

(Testimony of Charles W. Mapes, Jr.)

A. The mezzanine of the Sir Francis Drake Hotel.

Q. The entrance? A. The mezzanine.

Q. What was the purpose of that meeting?

A. Well, Mr. Denson called me aside and the purpose, I guess, was for the two of us to get better acquainted.

Q. Just a minute. Was that meeting previously arranged by either one of you?

A. No, I don't believe it was.

Q. Was it just an incidental meeting?

A. I wouldn't say it was incidental, but I came there to the hotel and we met.

Q. Well, was it arranged between you and he that you were to meet at the hotel? [649]

A. There was no definite date set.

Q. You just happened to meet accidentally?

A. It wasn't accidental. I was at the hotel with my family and I knew Mr. Denson was there.

Q. You knew he was there?

A. I had met him the night before, yes.

Q. Where did you meet with him alone, what part of the hotel?

A. The mezzanine of the Sir Francis Drake.

Q. Did you discuss any business matters or hotel matters upon that meeting?

A. Yes, I think we did. Mr. Denson said that he——

Mr. Cooke: Just answer the question, Mr. Mapes. You said you did, that is enough.

A. Yes.

(Testimony of Charles W. Mapes, Jr.)

Q. What was said by both of you?

Mr. Cooke: Objected to on the grounds it is immaterial, tends to vary the terms of the written agreement. Whatever was said between he and Mr. Denson can not be binding upon Mrs. Mapes, who was the first party in the agreement of September 24, 1945, and that this was prior to the time of that agreement and whatever was said or done from any standpoint would be precluded and excluded by the rules of the agreement itself, which would conclusively deem to include all preliminary negotiations by any of the parties who had any right to make any negotiations. [650]

The Court: Mr. Cooke, I think your statement of law is correct, but the thought that has influenced me in overruling that same objection so many times is that I am not certain about the principle, but in an equity proceeding all these matters might, some of them at least, bear upon the different principles, without which the Court would or would not decree specific performance in the case. For instance, that equitable or legal discretion the Court has, and whether or not the remedy should be damages or adequate legal remedy apart wholly from equitable matters, that might be considered by the Court. I agree with you that negotiations are generally merged in an executed written document. And that is my idea in admitting this evidence. The objection will be overruled.

Mr. Cooke: On what your Honor just stated, if I may be permitted, I would like to add that in any

(Testimony of Charles W. Mapes, Jr.)
event the rule of principle indicated by your Honor would not apply to proceedings and things said and done prior to the making of the written agreement. That might possibly be admissible after that time if there are uncertainties in the agreement that required clarifying.

The Court: I am not so sure of my view I take here, [651] but the thought I have is that when we come to decide the case and we have the benefit of citation of legal authorities by counsel on each side and the Court then would take into consideration only those matters that the Court thought were legally before the Court, regardless of any ruling that has been made here. I certainly would not decide a case on evidence which I, after study, determined was clearly inadmissible. I wouldn't do that; I would disregard it; so the objection will be overruled. I just want to explain the thought I have in mind. I do not dispute but what your statement of law contained in that objection is perhaps good law, but there is a question in my mind as to whether or not some of those matters should be taken into consideration in an equity proposition such as this. Objection will be overruled.

(Last question and answer read.)

Q. Well, the question was, did you discuss any business or hotel matters upon that meeting, that occasion? A. Yes.

Q. What was said by both of you?

A. Mr. Denson told me he was very anxious to

(Testimony of Charles W. Mapes, Jr.)

have a part in [652] the hotel. I asked Mr. Denson what part. He said, "Charles, I would like to have a third interest in the hotel with you." I said, "Well, Mr. Denson, I will think it over." He also told me of some of his experience in California, what he had done before I had met him. I don't know as I can remember what he said.

Q. He said he would like to have a third interest in the hotel? A. That's right.

Q. And aside from telling you his experience as a hotel man, was there anything else said by either one of you?

A. He mentioned he was very desirous of coming to Reno, that he had a hotel in Visalia and that he was anxious to get out of Visalia and wanted to come to Reno.

Q. Well, if you recall, did you meet him again?

A. The next time I met Mr. Denson was about 10 days or two weeks after the meeting at the Sir Francis Drake, at the Fielding Hotel in San Francisco?

Q. The Fielding Hotel?

A. The Fielding Hotel.

Q. Do you remember about the date of that meeting?

A. I couldn't testify definitely to the date. I know we stayed at the hotel but I think it was about two weeks after the meeting at the Sir Francis Drake.

Q. Who were present at that meeting? [653]

(Testimony of Charles W. Mapes, Jr.)

A. Mr. Slocum and Mr. Moorehead, Mr. Denson, mother and myself.

Q. What was said and done at that meeting?

A. Well, it was a meeting with Mr. Slocum and Mr. Moorehead, going over the proposed plans, the preliminary plans, they were making up for us on the hotel we were contemplating building.

Q. Do you know how Mr. Denson happened to be there on that occasion?

A. I don't know definitely. I didn't ask him why he was there.

Q. Did you ask him? A. No sir.

Q. Did you know he was going to be present?

A. No, I don't believe I did. I knew mother and Mr. Moorehead and Mr. Slocum were going to be there. There was no objection to Mr. Denson being there.

Q. But you are certain he was there?

A. I know he was there.

Q. Were plans of the hotel submitted at that time by Mr. Moorehead or Mr. Slocum or anybody else?

A. Mr. Moorehead and Mr. Slocum had sketch plans which they were showing to mother. In other words, they were trying to convince mother and the family that they would produce the ideas we wanted in the hotel in the plans that they were preparing. [654]

Q. Was there any discussion about plans?

A. There were quite a few things that mother

(Testimony of Charles W. Mapes, Jr.)

objected to. They had a building that was more or less pyramid shape and mother said she didn't like it, didn't want a building of that shape, and she didn't like the way they set the windows in and had too much ornamentation on top and there were several details mother definitely didn't want. She was sitting down with Mr. Slocum who was handling more the exterior part, and telling him definitely what she wanted.

Q. Did Mr. Denson participate in that conversation?

Mr. Cooke: Objected to on the grounds stated in the main objection.

The Court: Same ruling. Answer the question.

A. I believe he said something. I believe he was more or less explaining mother's view to Mr. Moorehead on the changes mother had in the plans.

Q. Well, in order to get at the facts, did he actively participate in discussion of the plans?

Mr. Cooke: Same objection to all this.

The Court: Same ruling.

A. Yes, he did speak at the meeting, yes.

Q. Well, did you have occasion to meet Mr. Denson after that time?

A. This meeting you were asking me about I think happend in the morning and then we went to lunch. I think that afternoon [655] Mr. Denson called me aside on the mezzanine and said, "Charles, have you thought any more about the proposition of you and I going in together on the hotel?" I said, "Yes, I have, Mr. Denson. I would only be

(Testimony of Charles W. Mapes, Jr.)

interested in a 30-70 per cent basis between you and I." Mr. Denson said, "Well, that is so close that is agreeable to me."

Q. Did you and Mr. Denson meet with anybody else that afternoon?

A. No, the discussions I had with Mr. Denson that afternoon were between Mr. Denson and myself.

Q. When, if at all, did you meet him again?

A. I think I met Mr. Denson the next time in Reno around September 22, 1945.

Q. Where did you meet him?

A. I know definitely I met him at my home.

Q. Who were present when you met him?

A. Mother was there and my sister Gloria, Mr. Denson and myself.

Q. How long did Mr. Denson stay?

A. Mr. Denson was our house guest and stayed three days, I believe, at our home.

Q. Did I understand you to say that was in September?

A. Around September 22, 1945, yes.

Q. And during those three days was there any business or hotel discussion? [656]

A. Yes. Mr. Denson and I discussed before mother the proposed agreement that we tentatively agreed on at the Fielding Hotel. Mr. Denson said it was agreeable that he take 30 per cent of the hotel and I take 70 per cent of the hotel. I mentioned to Mr. Denson that he being an older man with a shorter life expectancy than probably myself,

(Testimony of Charles W. Mapes, Jr.)

that I had the right, in case anything happend to him, to buy out his interest in the hotel, so I wouldn't have to do business with some outsider, Mr. Denson having no immediate heirs, only his wife.

Q. Well, what I would like to get at, of course, is what you said and what Mr. Denson said and what Mrs. Mapes said and what Gloria said. I would like to get the conversation.

A. My sister Gloria did not participate, as I recall, in any of these discussions. She was going to school and she was in and out. I don't think she was a party to any discussions there.

Q. Well, were there discussions there when you were not present?

A. There were no meetings held where I wasn't present at that time that I can recall.

Q. Will you state positively that Mr. Denson and your mother and other people never discussed hotel or business matters unless you were present?

A. I don't understand your question, Mr. Platt.

Q. Will you state, of your own knowledge, that Mr. Denson and [657] your mother or anybody else did not discuss hotel business or business matters while you were absent, not present?

A. How would I know? That answer is obvious.

Q. You wouldn't know, would you?

A. No.

Q. Therefore your statement to the effect you were always present has to be qualified?

(Testimony of Charles W. Mapes, Jr.)

A. The only time we had a meeting was when Mr. Denson, mother and myself were present.

Q. I will get back to my question. Will you state, of your own knowledge, that Mr. Denson and your mother never had a meeting unless you were present?

Mr. Cooke: Already answered.

A. Not to my knowledge, no. In fact, I am very definite there was no meeting that I wasn't present at that time.

Q. I am not talking about that time. I am talking about any time after you began discussions with reference to the hotel.

A. It is a broad question, Mr. Platt; I don't know.

Mr. Platt: The question is broad, with your Honor's indulgence, because the answer was broad.

(Question read.)

A. Well, Mr. Platt, you were talking about this meeting around September 22nd, 23rd, and 24th at our home the three days Mr. Denson was there. That was the only time that I recall or definitely know that Mr. Denson and my mother talked [658] when they weren't in my presence. That is what I thought I was answering you.

Q. There is no time that you can recall that your mother and Mr. Denson had an interview concerning hotel matters without your presence?

A. None that I know of.

Q. Well, how frequently during the 22nd or

(Testimony of Charles W. Mapes, Jr.)

23rd, and did you say the 24th of September, 1945, did you have discussion about the hotel?

A. I believe two days out of the three, I would say.

Q. Was anything else discussed except what you testified to as to the proportion that you were to get?

A. Yes, Mr. Denson had an agreement which he showed. I think there were three sets of it, of the preliminary paper which he wanted mother and himself and myself to sign.

Q. Well, did he ask you to sign it?

A. He asked us to look it over and to sign it, yes.

Q. Well, did you look it over?

A. Yes, we discussed it.

Q. How long did you discuss it?

A. Oh, I would say two or three hours.

Q. And you and your mother and Mr. Denson participated in this discussion? A. Yes.

Q. During the discussion the proposed agreement that Mr. [659] Denson presented was before you?

A. We had seen copies of it, yes.

Q. And you discussed it in every detail, did you?

A. I wouldn't say that we discussed it in every detail. Lots of times we got off the subject and back on. I don't know as we definitely discussed it for a period of two or three hours, but at any rate——

(Testimony of Charles W. Mapes, Jr.)

Q. (Interrupting) But you thoroughly understood the provisions?

A. I wouldn't say thoroughly understood the provisions.

Q. Not thoroughly?

A. That is obvious in view of what has happened.

Q. Well, did you make any investigation prior to that time with respect to rental conditions in an agreement of this sort?

A. No, I didn't. Mr. Denson had told me previously that he was going to draw up something that would be fair to mother and to all of us. It would be a preliminary paper, not in any way be binding on any party, and the paper which he brought up at this meeting was supposed to represent that document which he said he was going to prepare previously.

Q. And you are certain that he made the statement that the agreement would not be binding upon any party? A. Absolutely.

Q. When and where did he make that statement?

A. Mr. Denson made that statement at our home and also in our [660] attorney's office, I believe, on the 24th and also on October 4th when we signed the agreement and that all this was a preliminary paper, had no intentions of being binding on the parties. It was something to get us all started, to get this project going.

(Testimony of Charles W. Mapes, Jr.)

Q. Did he make that statement in the presence of Mr. Cooke?

A. I recall that he made that statement in Mr. Cooke's office on one of those occasions.

Q. What occasion?

A. It was either on the 24th or October 4th, I wouldn't know definitely.

Q. But it was on one of those occasions?

A. The best I can recall, yes.

Q. It has been suggested that I ask you what you mean in your answer that it was only to get you started? What did you mean by that?

A. Mr. Denson was very anxious to have something to show. In fact, he continually pressed mother to sign this agreement. He was continually after her while he was staying at the house for her to sign this agreement. He wanted something to show.

Q. Didn't he tell you and your mother that he wanted something to show in order that he could assist her in obtaining a loan and exercise an influence? A. Absolutely not.

Q. Never said anything of that sort? [661]

A. No.

Q. Were you present upon any occasion when a loan was discussed?

A. Not with Mr. Denson, no.

Q. You never heard any discussion between Mr. Denson and your mother about the question of a loan? A. No.

Q. I hand you Plaintiff's Exhibit "C", which

(Testimony of Charles W. Mapes, Jr.)
is the agreement in evidence here, dated September 24, 1945, and will ask you if you signed that agreement? A. That is my signature.

Q. When did you sign it?

A. I believe on October 4th, around October 4th.

Q. And at what place was it signed?

A. Mr. Cooke's office, our attorney's office.

Q. Was it signed in the presence of your attorney? A. Yes, I believe so.

Q. And at that time was there any check or money paid to your mother?

A. Mr. Denson presented a check for ten thousand dollars.

Q. You saw the check?

A. I don't recall seeing it but I knew of it.

Q. You know that he did?

A. I know that he did, yes.

Q. Well, did you pay anything? [662]

A. No, I didn't.

Q. Have you since paid anything?

A. It hasn't been demanded of me, so I haven't.

Q. Your mother has not demanded it of you?

A. Neither my mother nor Mr. Denson. There have been no demands made on me.

Q. It is certain your mother never demanded it?

A. I am not certain, no. She may have asked, but there was no demand. If there had been a demand, I was ready, willing and able to put up my share at any time up to April 1st.

Q. And your mother knew that?

(Testimony of Charles W. Mapes, Jr.)

A. The money was always available and could be obtained on short notice.

Q. Was there any understanding between you and Mr. Denson and your mother that Mr. Denson was to put up any more than ten thousand dollars or any less?

A. There was no understanding between Mr. Denson and myself at all what any of us was to put up. Mr. Denson, of his own volition, wrote out a check for ten thousand dollars, without my knowledge, and presented to mother.

Q. Without your knowledge?

A. Without my previous knowledge of the fact he would put up any definite amount. We never had any agreement as to what he was to put up or I was to put up.

Q. I show you this agreement in evidence here and call your [663] attention to Section 1 of it, which reads: In consideration of the premises and for other valuable and sufficient consideration, present and received, the receipt whereof is hereby mutually acknowledged by the parties, that contemporaneously with the execution and delivery hereof the second parties shall deposit with the first party the sum of \$20,000 in cash as a guaranty of their good faith and by way of inducement for first party to enter into this agreement." What do you understand that to mean?

A. Mr. Denson and I were to pay a total of \$20,000.

(Testimony of Charles W. Mapes, Jr.)

Q. How much of that was Mr. Denson to put up and how much were you to put up?

Mr. Cooke: We object to that. The paper must be allowed to speak for itself.

The Court: Objection will be overruled.

A. I never discussed it with Mr. Denson.

Q. I am asking about your understanding of it. I am not asking about discussion. You have the agreement, you signed the agreement, you read the agreement, now according to your understanding, how much was Mr. Denson to put up and how much were you to put up as a preliminary payment?

A. I didn't go into the legality of it at that time.

Q. I am not asking about the legality of it. I am asking you to answer that question.

A. It was my understanding that our total payments were to [664] equal \$20,000.

Q. Well, how much of that were you to put up, according to your understanding, and how much was Mr. Denson to put up?

A. That I would say between the two of us we would have to agree. I don't think it would be right for me to give my opinion any more than anybody until we agreed on it. We never agreed on any amount. Mr. Denson just wrote out a check for ten thousand dollars, is the first time I knew of it.

Q. Well, was it your understanding that you didn't have to put up anything.

A. It was not my understanding.

Q. Well, what was your understanding?

(Testimony of Charles W. Mapes, Jr.)

A. As I repeated before, that Mr. Denson and I were to put up the total of \$20,000.

Q. Well originally how much, according to your understanding, were you to put up and how much was Mr. Denson to put up?

A. I would say Mr. Denson and I would have to agree on it beforehand.

Q. Wasn't it agreed and understood beforehand, according to that agreement, that you should each put up ten thousand dollars?

A. It was not definitely, no.

Q. Well, were you instructed by your lawyer what the importance of signing such an agreement like that meant?

A. It was the intention of this agreement that it was just a [665] preliminary agreement. Mr. Denson said it several times, "Charles, whatever your mother, Mrs. Mapes, wants we are going to be fair and reasonable to her at all times and I want you to feel that we are working for your mother's interests and this paper is something to get us started and it is not intended to be binding on any of us."

Q. Do you know why the paper was signed?

A. It was signed with that intention. That is the reason I signed it. After all we thought we could get along harmoniously. It was sort of a big enterprise for all of us and Mr. Denson, at practically every meeting I had with him privately expressed the fact, "Charles, you and I are going to

(Testimony of Charles W. Mapes, Jr.)

bend over backwards to treat Mrs. Mapes, your mother, right.”

Q. And he has repeatedly told you that, hasn't he?

A. He had up to that time, yes.

Q. And repeatedly since, hasn't he?

A. Until we—previous meetings, yes, then he denied all that; up until the time he denied it.

Q. Denied what?

A. Well, I think it was around April 1st.

Q. In 1946? A. Yes.

Q. After you and he had had a conversation at Mr. Moorehead's office?

A. We had a conversation at Mr. Moorehead's office, yes. [666]

Mr. Platt: I am coming back to that, your Honor, but I want to finish up with this exhibit that we are on.

Q. Had you discussed this agreement with your attorney before you signed it?

A. I don't recall. I was in the navy at that time and I know I only came up on weekends.

Q. You mean to say you may have?

A. I may have and I may not have. I don't definitely recall.

Q. I call your attention to that part of the agreement which provides that you and Mr. Denson are to suitably furnish the hotel. A. Yes.

Q. Did you understand that?

(Testimony of Charles W. Mapes, Jr.)

A. That we were to provide the furnishings for the hotel?

Q. Yes. A. Yes.

Q. What was your understanding as to how much Mr. Denson was to contribute toward the furnishing of the hotel and how much were you to contribute?

A. That I was to furnish 70 per cent and Mr. Denson 30 per cent. However, I could never get Mr. Denson definitely together and never definitely decide. I do not think that was ever definitely discussed between Mr. Denson and I as to what amount of money he wanted us to put up.

Q. Is there anything in that agreement that indicates liability [667] for 70 per cent and 30 per cent proportion?

Mr. Cooke: Objected to; the agreement shows for itself.

The Court: I think the agreement has to show for itself. Objection is sustained.

Q. I show you some initials on the margin of page 4 of this agreement. Do your initials appear there? A. Yes.

Q. When did you initial it?

A. I believe that was October 4th, around October 4th.

Q. I call your attention to paragraph 5 of this agreement and I will ask you if it was your understanding that the gross receipts from various departments of the hotel were to be included in the

(Testimony of Charles W. Mapes, Jr.)

lease in accordance with the provisions of that agreement?

Mr. Cooke: Objected to as irrelevant and immaterial as to his understanding as to that. The document controls the understanding.

The Court: Objection overruled. Answer the question.

A. It was my understanding that he would always be right and fair with mother. If these percentages would work a hardship on her that Mr. Denson and I would make it right and reasonable with mother. After all, when we made up this agreement there wasn't any building built, there was no fixed contract, there was nothing to determine the cost or her investment and [668] it wasn't considered in my opinion fair to tie anything definitely down until we definitely knew the cost of the building. Mr. Denson said that he would always be fair and reasonable to mother.

Q. Well, he always has been, hasn't he?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: That is a matter for the Court to determine, one of the matters. Objection sustained.

Q. And he repeatedly said that, didn't he?

A. He said that while we were in the process of negotiations.

Q. I call your attention to what purports to be a letter written by you on November 20th to Mr. Denson, addressed in an envelope to Mr. P. G.

(Testimony of Charles W. Mapes, Jr.)

Denson, Hotel Johnson, Visalia, California, and ask you if you wrote him that letter?

A. This is my letter, yes.

Mr. Platt: In order to keep the record straight, your Honor, that letter is Plaintiff's Exhibit "H."

The Court: The letter just handed the witness, or Exhibit "H," is already admitted in evidence, is that correct?

Mr. Platt: Yes, your Honor.

Q. In the beginning of this letter you said: "Thought I would drop you a short note and bring you up to date on what has been happening lately." What do you mean by that, "What [669] was happening lately," with respect to your hotel project?

A. I haven't seen that letter since I wrote it, Mr. Platt, I wouldn't know.

Q. I hand the letter to you and ask you to look at it while I ask the question.

A. I don't think anything particular happened lately; what happened in Reno.

Q. To what did that refer?

A. I don't know what happened—what I put in the rest of the letter, I don't know.

Q. Weren't you trying to keep Mr. Denson up to date with respect to the progress being made of the hotel?

A. Yes, I probably did give him the information about the hotel. No reason why I shouldn't at that time.

Q. Well, you have also stated in this letter: "We had a long hall leading to the lobby that we asked

(Testimony of Charles W. Mapes, Jr.)

him to change." Whom do you mean by "him"?

A. Our architect, Mr. Slocum.

Q. "We asked him to change that and bring the lobby closer to Virginia, hence shortening two of the stores, but I think you will agree that it is most necessary. Also the two entrances to the garage have been consolidated to one under the present dining room." Now those references were all to the hotel, were they not? A. Yes. [670]

Q. Then you said: "These are the biggest changes and when we get the plans I would like to have your reaction on it." Why were you interested in his reaction?

A. I don't recall what my ideas were at that time.

Q. As a matter of fact, you were leaning upon Mr. Denson, leaning upon his experience, weren't you, upon his advice?

A. No, we had a very competent engineer, we had a superintendent who had built twenty buildings bigger than the one now building, had an architect, very skilled, mechanical engineer, another assistant architect. When we wanted any advice all of these people were skilled in hotel buildings, that was their specialty. It is natural that we would look to those people.

Q. Hadn't you solicited Mr. Denson's counsel and advice on many occasions?

A. I don't think I solicited his advice at any time. Most of the meetings I had with Mr. Denson

(Testimony of Charles W. Mapes, Jr.)

were more or less bringing him up to date, what we had already done with the hotel.

Q. Why were you trying to bring him up to date?

A. I thought he should know. He had a definite interest in what was going on in the hotel.

Q. He had a definite interest?

A. He was interested in the hotel.

Q. Did you always regard the fact that he had a definite interest?

A. That he and I, after the hotel were built, were to be associated [671] in the running of it, yes.

Q. Well, will you tell me why you stated in this letter that you would like to have his reaction on the changes that you were contemplating?

Mr. Cooke: We submit he has already answered the question.

The Court: Objection overruled.

A. I don't recall what my reasons were at that time, any more than I ask you for a reaction, I guess.

Q. That is your answer, is it, that you had the same reason for soliciting Mr. Denson's reaction to the improvements you were suggesting on the hotel, or changes, that you would have to ask me, a perfect stranger to the progress, is that your answer?

A. I didn't mean it that way, no.

Q. Well, how did you mean it?

A. I meant I wanted to get his reaction.

Q. Why did you want to get it?

A. It is so long ago I don't recall.

(Testimony of Charles W. Mapes, Jr.)

The Court: We will take our noon recess.

Afternoon Sessession, December 12, 1946, 2:00 p.m.

Appearances same as at previous session.

Charles W. Mapes, Jr., resumed the stand on further examination by Mr. Platt. [672]

Q. Calling your attention again, Mr. Mapes, to your letter to Mr. Denson of November 20th, I desire to read the following from it: "Mr. Burhans from Dohrmann's Hotel Supply came to the house. He is particularly anxious to help us on the layout of the kitchen before we start work." What did you mean by stating, "He is particularly anxious to help us * * *"?

A. I think Mr. Burhans had spoken to both mother and myself and mentioned something to the effect that we ought to have some sort of a kitchen lay-out or plan before laying out the plumbing and electrical work.

Q. Now when you stated in this letter that Mr. Burhans was anxious to help us on the lay-out of the kitchen, do you mean you and Mr. Denson, or do you mean you and your mother?

A. I think I mean my mother and myself.

Q. Although you were writing to Mr. Denson?

A. That's right.

Q. Well, didn't you understand that Mr. Denson was interested in the lay-out, furnishings?

A. Yes, it was contemplated that if we could get together on the lease of the hotel with mother that Mr. Denson and myself would be in operation of the hotel.

(Testimony of Charles W. Mapes, Jr.)

Q. Then you say: "I told him that it would be some time yet before we got the plans in shape to talk definitely on what we needed. That at that time I wanted you here to discuss it with him." To whom did you refer when you said, "I wanted you [673] here to discuss it with him"?

A. I referred to Mr. Denson.

Q. I hand you another letter attached to the same exhibit. Purportedly it is written by you on Monday, December 3rd, and will ask you if you wrote that letter?

A. That's my letter.

Q. The envelope bears the year 1945. Was that letter written by you on December 3, 1945?

A. I believe so.

Q. You start the letter this way: "Dear Mr. Denson: Glad to hear your voice over the phone and also to hear that your sale is progressing." When did he phone you? When did Mr. Denson phone you?

A. I can't state the date.

Q. Was it a short time before you wrote this letter?

A. I imagine it must have been.

Q. To what do you refer when you say, "and also to hear that your sale is progressing"?

A. Mr. Denson had told me that he intended to sell his lease that he had on his hotel in Visalia at practically our second meeting and he wasn't satisfied with Visalia, that he would like to get out of there and come to Reno. On previous occasions he told me that he was selling the hotel.

Q. Did he ever tell you that he was selling it at a sacrifice?

A. No. [674]

(Testimony of Charles W. Mapes, Jr.)

Q. You are satisfied of that?

A. Mr. Denson told me he had a very fine offer to sell the hotel and it was a good time to sell the hotel and he was going to take it on.

Q. But he did make it clear to you that he was selling his hotel in order to devote his activities to the Mapes Hotel?

A. No, Mr. Denson stated that if he didn't sell his hotel he still wanted to get away from Visalia, that he had a son-in-law he would put in the business to run the hotel, that he didn't want to stay in Visalia any longer.

Q. Where did he say that?

A. I don't definitely recall the meeting. Probably one of the meetings we had in San Francisco.

Q. Do you know about when?

A. I would say off-hand that it was either at the Sir Francis Drake Hotel or the Fielding Hotel.

Q. Was it before or after the contract was signed?

A. He told me this before the contract was signed.

Q. You also write in your letter: "They, the City Council, admit they can't afford to widen the street for the next eight years and this, together with the picture in the paper, might make them realize the damage they would be doing to the property of they 'bottle neck' us." To what picture in the paper do you refer?

A. The picture of the hotel. At that time I

(Testimony of Charles W. Mapes, Jr.)

think we had an [675] ad in the paper to the effect showing the hotel as the architect had drawn it up and it was a full page ad, calling the attention of the people of Reno what we thought the injustice was in the city not selling us the 12 feet.

Q. Is that the real reason why the article in the Journal and Gazette, which was introduced in evidence here, was printed?

A. No, this was another picture. It was a full page in the Gazette or Journal.

Q. Another picture?

A. Another picture of the hotel and stated our arguments and why we thought the city should sell us this 12-foot strip.

Q. Before I go on with the letter I want to call your attention to Plaintiff's Exhibit No. "I," which is two newspaper articles, one in the Nevada State Journal and the other in the Reno Evening Gazette, printed on December 2nd and 3rd, 1945, respectively, containing a purported picture of the proposed hotel building and quite a long narrative in the paper. Who gave that information to both of the papers? A. I did.

Q. Calling your attention to the Sunday morning, December 2nd article in the Nevada State Journal, there is stated in it the following: "When completed and furnished the hotel will be managed by Mapes and Peter G. Denson, who now owns and operates the Hotel Johnson at Visalia, California." Who gave that information to the paper? [676]

(Testimony of Charles W. Mapes, Jr.)

A. Mr. Denson had written me a letter giving me his background and this article is the wording of the reporter. It is the reporter's own words. I just gave the bare facts and he put it in the words.

Q. Have you a copy of the article you furnished to the newspapers?

A. I didn't furnish any article.

Q. You didn't furnish any article?

A. The only article I showed them was an article Mr. Denson wrote us about the history of his life.

Q. Well, how did it get the history of your life and your mother's and the family all included in it? Did Mr. Denson furnish them or did your mother?

A. I recited them.

Q. Well, is it true, as printed in this article, that when completed and furnished the hotel will be managed by Mapes and Peter G. Denson?

A. Well, those weren't my words, but I was trying to explain that the reporter wrote up the article and the first I saw the article was in the newspaper.

Q. It is true, isn't it?

A. It was contemplated, yes, that if we could get together on the lease.

Q. Then in the Reno Evening Gazette of December 3, 1945, there appears a similar statement: "The hotel is being built and [677] will be managed by the firm of Charles W. Mapes, Jr., and Peter G. Denson. Denson has been active in the hotel business for nearly thirty years and owns and operates the Johnson Hotel at Visalia, California." Who

(Testimony of Charles W. Mapes, Jr.)

gave that information to the Reno Evening Gazette?

A. I gave the information to the reporter and the reporter wrote up the story.

Q. You give quite an extended narrative in this letter as to the progress made of the hotel, which has already been read to the Court, but why did you give Mr. Denson the information contained in that letter?

Mr. Cooke: What letter are you referring to?

Mr. Platt: December 3, 1945.

Mr. Cooke: What exhibit number is that?

Mr. Platt: Well, it is a part of Exhibit "H."

Mr. Cooke: We object to it on the ground that it is irrelevant and immaterial; does not have any tendency to prove or disprove any waiver or any change in the written agreement; that nothing that he could say to the plaintiff, Mr. Denson, would be any evidence as against Mrs. Mapes, who is the party of the first part in that agreement, and therefore this would be immaterial for any purpose whatsoever as to why he asked Mr. Denson the questions proposed to be set forth in that letter.

The Court: Objection overruled. Answer the question.

(Question read.) [678]

A. Well, it was contemplated that if Mr. Denson and I could get together on the lease with mother that we would be associated in the operation of the hotel.

Q. Then further on in the letter you said: "You

(Testimony of Charles W. Mapes, Jr.)
might inquire on the pressed bricks, not Visalia, but around Sacramento or Stockton. If you have any leads, let Moorehead know, as I don't think we can count on the local supply here. Moorehead has two leads, one in Sacramento and one in Stockton." Why did you write that to Mr. Denson?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. Well, at that time it looked like we were going to have trouble in getting the quantity of bricks that we needed. Mr. Denson was in that territory and I wrote to him as friend. I didn't need to make a trip there and I knew he often went to Sacramento and I thought on his way he could inquire. As it turned out we got all the bricks we wanted any way.

Q. Further on in the letter you say: "Since I have seen you last I have had several ideas that I would like to discuss with you after your deal is closed down there." You are referring to the sale of the Johnson Hotel? A. I believe I was.

Q. "One I might mention now. We can get a radio station on the building, either the mezzanine space or the roof." By referring "We can get a radio station," to whom do you refer? [679]

Mr. Cooke: Same objection and the further objection that this be hearsay as to the defendant Mrs. Mapes, who is party of the first part in the agreement of September 24, 1945; that this purports merely to be a conversation by way of letter between two parties, parties of the second part, as co-lessees

(Testimony of Charles W. Mapes, Jr.)

prospective and what they said to each other would be irrelevant and immaterial upon the question of the specific performance of the agreement as to Mrs. Mapes. It is not shown that Mr. Charles W. Mapes was her agent for the purpose of changing that agreement any more than Mr. Denson was. The further objection that this shows on its face that it is a discussion between these parties, with contemplation that they would give this lease some time or other and that it was their own private business, in which Mrs. Mapes has no interest, any more than she already stated she wanted to see them get together on some business basis before she signed up the lease, but this does not go to that.

The Court: Objection will be overruled. Answer the question.

(Question read.)

A. I believe it was myself and Mr. Denson.

Q. You state further in this letter as follows: "Mother is enclosing you separately the articles in the paper." Do you know whether she did or not?

A. I don't recall. [680]

Q. What were the other ideas that you wanted to discuss with Mr. Denson that you refer to in this letter, aside from the matter of the radio station?

Mr. Cooke: Same objection.

The Court: Same ruling.

A. Well, I wanted to get Mr. Denson so we could draw up some papers between ourselves and

(Testimony of Charles W. Mapes, Jr.)

how we were to operate this lease which we were to get from mother.

Q. Is that your answer?

A. Yes, I think that was one of the ideas.

Q. You say now that this is what you had in mind when you wrote that part of this letter?

A. As far as I can recall now.

Q. Do you recall any other ideas you had in mind at that time? A. No, I can't.

Q. You state further: "As for the information you wanted from me for the hotel magazines, it is enclosed." What information was that?

A. Mr. Denson drafted myself and mother a letter, stating that he wanted to get some information from me as to my background and just as I mentioned there.

Q. Did he write you such a letter?

A. He wrote it either to mother or myself, yes.

Q. Do you know whether that letter is available or not? [681] A. I think it is.

Q. Well, if it is will you try to produce it?

A. Yes.

Q. Did you later see the articles published in the hotel magazines, or some of them?

A. No. I did not see some of those later.

Q. Well, you have seen them?

A. Some of them I have never seen.

Q. Well, I call your attention to Plaintiff's Exhibit No. "J," which exhibit includes three magazines. I call your attention to the Hotel and Restaurant Reporter, is the title of one of the

(Testimony of Charles W. Mapes, Jr.)

magazines, and particularly to page 4 thereof, purportedly containing a cut of the proposed Mapes Hotel, and will ask you when, if at all, you saw it?

A. This is the first time I have seen it.

Q. You never have seen it before?

A. No sir.

Q. I call your attention to another magazine made a part of the exhibit, Keeler's Pacific Hotel and Restaurant Review, particularly to page 47, which likewise purports to contain a cut of the hotel, and ask you if and when you saw that?

A. This is the first time I have seen this also.

Q. I call your attention to another magazine, Western Hotel and Restaurant Reporter, included in Exhibit "J," containing an article on page 6, advertising for a name for the new Reno [682] Hotel. Have you ever seen that before?

A. I think some time late in the fall there was a representative of one of these magazines showed me a copy?

Q. This one?

A. Either this one or another one. I do not think I have seen that one.

Q. Well, I understood you to state definitely that you hadn't seen either one of the two previous magazines. Now what is your recollection, did you or didn't you?

A. I don't think I have seen any of these three magazines.

Q. Well, you stated you saw some magazine article. What magazine did you see?

(Testimony of Charles W. Mapes, Jr.)

A. I don't recall the name. I don't have a copy of it. It was just shown to me. That was much later than any of these articles. In fact, it must have been some time the late fall or early winter of 1945, 1946. It was some time in '46.

Q. That you saw these magazine articles?

A. There was a representative of a magazine company that showed me one of the articles, as I recall, a magazine company.

Q. Do you remember what time in 1946 you saw them? A. Not definitely, no.

Q. Well, approximately?

A. It must have been some time after—well, I would say it was some time this summer.

Q. In the summer of 1946? [683] A. Yes.

Mr. Cooke: Were you referring to the magazine or the representative that you saw?

A. Well, I met this representative.

Q. When, after the signing of this contract by you and the other parties to it, did you again see Mr. Denson?

A. After signing of the contract?

Q. Yes.

A. I think I saw Mr. Denson around December 28th.

Q. 1945? A. '45.

Q. Where did you see him?

A. I met Mr. Denson in Mr. Moorehead's office in Oakland, California.

Q. How did you happen to meet Mr. Denson in Mr. Moorehead's office on December 28, 1945?

(Testimony of Charles W. Mapes, Jr.)

A. I don't quite recall how we got together on that meeting. I know I went down to meet with my engineer and was on my way to go to the Rose Bowl game on January 1st. I don't recall whether I called Mr. Denson and asked him to meet me there or just how it was arranged.

Q. But you either called him or he called you, is that it?

A. Well, evidently the word got around some how.

Q. And do you remember about what time on December 28th you met in Mr. Moorehead's office?

A. I believe it was in the morning.

Q. Who were present at the meeting?

A. Mr. Moorehead, Mr. Denson and myself, Mr. Slocum, I think, I am not sure.

Q. The architect? A. Yes sir.

Q. What did you talk about on that occasion?

A. Well, Mr. Moorehead had been to Reno several times going over the plans of the hotel with mother and myself and I was very anxious to see if he had incorporated the ideas we discussed with him in the plans he was working on in Oakland.

Q. You, of course, knew that Mr. Denson was going to be present at that conversation?

A. Yes.

Q. Why was he present?

A. I think Mr. Denson wanted to be acquainted with the plans. I don't know any particular reason why Mr. Denson was present there. We were going over the plans with the engineer.

(Testimony of Charles W. Mapes, Jr.)

Q. Did Mr. Denson enter into the discussion as to the plans?

A. He participated in talking and most of the time was spent on bringing Mr. Denson up to date and what had transpired on the plans.

Q. Who brought Mr. Denson up to date as to the development of the plans?

A. I don't know any particular person, just went over the [685] plans like anybody would go over the plans.

Q. Well, then one of the objects of the meeting was to bring Mr. Denson up to date as to the change of plans?

A. That wasn't the object of the meeting.

Q. Well, that was one of the objects, wasn't it?

A. I don't think it was an object of the meeting. That was the object of my meeting with Mr. Moorehead. Mr. Denson was perfectly—it was agreeable with me to have him listen in to the conversation.

Q. Didn't you testify a little while ago that you wanted Mr. Denson to be brought up to date with the plans?

A. Well, I stated what was done at the meeting.

Q. And were all the plans observed by Mr. Denson on that occasions?

A. I think he went over them.

Q. Did he make any suggestions?

A. Not that I recall.

Q. He may have but you don't recall that?

A. I don't think he made any suggestions.

Q. Made many?

(Testimony of Charles W. Mapes, Jr.)

A. I don't think he made any suggestions. I think he probably asked questions on some of the changes that had been made and he expressed approval. He thought it was progressing along very fine.

Q. Well when did you meet Mr. Denson again after December 28, [686] 1945?

A. Well, to the best of my knowledge I met Mr. Denson around January 25th at Reno at my home, and January 26th.

Q. And where did you meet him?

Mr. Cooke: He said at his home.

A. At home, at my home.

Q. Well at that time he was a house guest at your home, wasn't he? A. No, he was not.

Q. Wasn't he? A. No sir.

Q. How many days during his visit here did you meet with him at your home?

A. I saw Mr. Denson two days.

Q. The 25th and 26th?

A. 25th and 26th.

Q. Of January? A. Of January.

Q. 1946? A. Yes sir.

Q. Well, were hotel matters and affairs talked about at those meetings? A. Yes.

Q. Was the 12-foot strip discussed?

A. I believe so. We were trying to get it from the city [687] and it was on our minds.

Q. Mr. Denson just reminded me that you phoned Mr. Denson on the 26th or 27th of Decem-

(Testimony of Charles W. Mapes, Jr.)

ber, 1945. While he was in Los Angeles. Now is that so?

A. I believe that could be so. I told you I wasn't definite. I knew I was down in San Francisco around the 28th.

Q. And that meeting to which you have testified occurred in Mr. Moorehead's office on December 28th?

A. Yes.

Q. In other words, you sought the meeting?

A. There were two meetings with Mr. Denson, one in Mr. Moorehead's office on that day and another meeting at the Levington Hotel later.

Q. In Oakland?

A. In Oakland. I think both Mr. Denson and myself were registered in the hotel at that time.

Q. What did you discuss with reference to the hotel on that date?

The Court: Did this have reference to December or January 1946?

Mr. Platt: December 28th.

Q. You only referred in your examination to one meeting with Mr. Denson on the 28th and now you say you had another meeting later in the day at the Levington Hotel?

A. You only asked me about one. Do you want to know what [688] the main purpose for Mr. Denson and I to get together at this particular date was the fact that I wanted him to get together with me to draw up a written agreement and how we were to handle our association in the hotel. Right after we met

(Testimony of Charles W. Mapes, Jr.)

in Mr. Moorehead's office I walked to the hotel with Mr. Denson. I think we went up to his room and I said, "Mr. Denson, can we get together on some definite terms between you and I?" And he said, "Charles, I have to leave immediately for Visalia. I have to do some business on my hotel." I said, "Mr. Denson, I think it is high time that you and I got together." Mr. Denson got in such a hurry that I practically helped him pack his bags and watched him check out of the hotel, with the understanding that he would get together with me as soon as he got this business through so that we could get together and get everything in black and white.

Q. After that you met Mr. Denson in Reno on January 25th and 26th? A. Yes.

Q. How did Mr. Denson happen to come to Reno at that time, do you know?

A. Mr. Denson promised me that he would come to Reno and that we would get together on our agreement. This particular time we had our plans and specifications and permit had been taken out to build the hotel. I went over the plans and showed Mr. Denson the specifications, told him that the permit had been [689] applied for; also Mr. Denson saw the building permit.

Q. Let me ask you this, Mr. Mapes. Did you ever offer any objection to Mr. Denson as to the percentage of payments for rental that your mother was to receive or that you and he were to pay?

Mr. Cooke: Objected to as irrelevant and immaterial. The contract speaks for itself.

(Testimony of Charles W. Mapes, Jr.)

Mr. Platt: Well, if it speaks for itself, your Honor, then this said agreement goes out of the window. I think counsel ought to take one position or the other.

The Court: Objection overruled. You may answer the question.

A. What percentages are you talking about?

Q. Percentages appearing in section 5 of the previously addressed questions.

(Previous question read.)

A. No, I don't believe so because Mr. Denson had always said that he and I would take care of mother, that everything would be fair and reasonable, that Mrs. Mapes would always be taken care of. That was my understanding.

Q. And do I understand that he made that statement repeatedly?

A. Mr. Denson made that statement while we were negotiating this preliminary agreement with mother.

Q. Well, how many times did he make it since the contract was signed? [690]

A. Not very many, if at all.

Q. Well, how many?

A. I doubt if he mentioned it after that.

Q. Didn't I understand you to testify that he did mention it on different occasions?

A. He did mention——

Mr. Cooke: (Interrupting) What counsel understands is not a question the witness can answer.

(Testimony of Charles W. Mapes, Jr.)

The Court: Objection overruled. He was calling his attention to the testimony.

A. He did mention it.

Q. Did you testify that on several occasions Mr. Denson said that he would always take care of mother?

A. I did.

Q. And that this is why you never offered any objection to any part of this agreement or section 5, concerning the payments that you and he were to make to your mother and she would receive?

A. I didn't say—that wasn't the reason for me not raising any objections. I said Mr. Denson had repeatedly told me while we were negotiating with mother on this preliminary paper, on the meetings we had had previous to that, "Charles, don't worry, we will always take care of Mrs. Mapes."

Q. In order to understand you, Mr. Mapes, he never, according to your testimony, made such a statement subsequent to the [691] signing of this agreement?

A. Not that I can recall.

Q. Well, you mean after this agreement was signed he never made such a statement?

A. I can't recall.

Q. And there is no doubt about this, is there, that you yourself never made any objection at all to the rental percentage provisions provided in this agreement? I mean objections to Mr. Denson?

A. It was always my understanding—

Q. (Interrupting) Now will you answer the question.

A. I can't answer your question yes or no.

(Testimony of Charles W. Mapes, Jr.)

Q. Well answer it yes or no and explain it. I think the court will permit that.

(Question read.)

A. No, I didn't. It was my understanding if there were anything wrong, Mr. Denson and I would take it upon ourselves to correct it.

Q. You saw Mr. Denson on two occasions, January 25th and January 26, 1946, at your mother's home in Reno? A. Yes.

Q. Is that right? A. Yes.

Q. Were hotel matters discussed?

A. Yes. [692]

Q. Was there any discussion between you and your mother and Mr. Denson about any visit that Mr. Denson had made to Mr. Hopper on or about January 25, 1946, with respect to the 12-foot strip?

A. I believe so. I believe so.

Q. You believe so? Do you remember what Mr. Denson said?

A. No, I think that was more or less between mother and Mr. Denson at that time. I was busy taking out the building permit.

Q. But you heard some of the conversation?

A. I think I recall.

Q. And your recollection is it was on about the 25th or 26th of January?

A. I don't know what day it was on.

Q. When did you see Mr. Denson again?

A. The next time I saw Mr. Denson was around April 1, 1946.

(Testimony of Charles W. Mapes, Jr.)

Q. Where did you see him?

A. At the Sir Francis Drake Hotel.

Q. How did you happen to meet him at the Sir Francis Drake Hotel on April 1st?

A. I met him in the morning and had breakfast with him and then proceeded over to Mr. Moorehead's office for a meeting.

Q. How did you know that Mr. Denson was going to be in San Francisco on that day and meet you?

A. I think Mr. Denson had called mother around the 25th or [693] 26th of March, mentioned something about wanting me to come down to Los Angeles to look at some furnishings the interior decorator in Barker Bros. was working on. I wasn't home and Mr. Denson called me the next day, the 26th or 27th.

Q. Called you personally?

A. Called me personally and Mr. Denson mentioned that he had this young lady from Barker Bros., who was working on furnishings for the hotel and wanted me to go down to Los Angeles. I told Mr. Denson I didn't want to go down to Los Angeles, I wanted to get together on an agreement with him so that he and I would have our association down in black and white, that I was a little hurt that he was going ahead definitely making plans on furnishings without even consulting me, that this was the first I had ever known about it, his going after furnishings with Barker Bros.

(Testimony of Charles W. Mapes, Jr.)

Mr. Denson said he had already made the arrangements with Barker Bros. and it would look very bad for him if he couldn't go ahead. I said, "Mr. Denson, I will call you back later." I think I called him up two days later and said I couldn't go to Los Angeles but I would meet him in San Francisco in Mr. Moorehead's office——

Q. (Interrupting) There is one thing certain, isn't there, Mr. Mapes——

Mr. Cooke: (Interrupting) Did you finish your answer? I thought you started to say something.

Witness: I think I finished. [694]

Q. Well, there is one thing certain, isn't there, Mr. Mapes, that Mr. Denson didn't close any deal with Barker Bros. or anybody else without first consulting you?

A. I wouldn't have any knowledge.

Q. At least if he did, you have no knowledge of it?

A. I had no knowledge until he called me that he was even consulting.

Q. He sent for you to consult, didn't he?

A. He wanted me to go and see the plans and ideas.

Q. It had been suggested that I ask you whether you yourself hadn't been making some inquiries about furnishings and equipping the hotel, providing the lay-out, as it is termed here?

Mr. Cooke: When, what time?

Q. Well, I recall reading from your letter that

(Testimony of Charles W. Mapes, Jr.)

you had an interview with some representative from Dohrmann Company.

A. This salesman from Dohrmann Hotel Supply, which would have our kitchens and the architects, they were to furnish all the public spaces. At that time we were working on drawings too that we could present to the various furniture companies to get respective bids. I didn't contact any furnishing people.

Q. Had you contacted any other people, equipment supply people or coffee shop supply company?

A. Only as pertained to the construction of the hotel itself.

Q. And did you confer with anybody with respect to furnishing and equipping the hotel as provided for in the agreement?

A. No, I hadn't. So far off that it wasn't necessary.

Q. Well, had you independently consulted any supply company in Florida? A. In what?

Q. The State of Florida?

A. State of Florida?

Q. Yes.

A. No. Supply company—what do you mean by supply company?

Q. On any part or portion of the contemplated equipment?

A. Do you mean equipment of the hotel or construction?

Q. Any part or portion of the lay-out equipment.

(Testimony of Charles W. Mapes, Jr.)

A. It isn't clear—we have about a thousand contracts, Mr. Platt.

Q. Included in the agreement with respect to your furnishing the hotel with Mr. Denson?

A. No.

Q. Well, when you met with Mr. Denson at Mr. Moorehead's office in Oakland, who were present?

A. There was Mr. Denson, I think my uncle, William S. Hall, Mr. Moorehead, Mr. Slocum, Miss Mason and myself.

Q. What was said and done at that meeting?

Mr. Cooke: Same objection heretofore made, irrelevant and immaterial.

The Court: Same ruling.

Q. Mr. Denson had Miss Mason present the work she had done [696] for Barker Bros. on the hotel. We looked at some of the drawings. The plans were very much out of date and we discussed several of the ideas she had in there that were not practical. The coffee shop was much too small and where the kitchen lay-out was made I recall that the help had to go to the back of the kitchen for the dishes and it wasn't worked so it would save the help any steps. There were several undesirable things. Mr. Moorehead was really a little impatient that we were listening to Miss Mason at that time because we were discussing public space and that was part of his job, to make the lay-outs for the public space.

Q. Well, it is true, isn't it, that you participated

(Testimony of Charles W. Mapes, Jr.)

in all that conversation and received what benefit could be derived from the conversation through Miss Mason's presentation?

A. There wasn't any benefit; the plans were so out of date.

Q. Well, there was nothing concealed from you about what Miss Mason, a representative of Barker Bros., presented?

A. No, I don't think so.

Q. And did Mr. Denson even indicate or tell you that he was going to close any deal with Barker Bros. without consulting you?

A. I don't recall that he did, but he expressed his ideas as coinciding with Miss Mason's. He liked the lay-out arrangement.

Q. How long did that conference continue in Oakland at that time in Mr. Moorehead's office?

A. Oh, maybe an hour, an hour or two hours, I don't know.

Q. And did you have any further conference?

A. Yes, I drove Mr. Denson and Miss Mason back to the Sir Francis Drake Hotel. Met Mr. Denson later that afternoon at his hotel room in the hotel.

Q. Was there anybody else there beside you and Mr. Denson?

A. Just Mr. Denson and myself.

Q. What was discussed there?

A. I asked Mr. Denson if we couldn't get together on our agreement about how we were to operate the hotel. Mr. Denson said, "Why, Charles,

(Testimony of Charles W. Mapes, Jr.)

you are not to operate the hotel; you are to go away to law school." I said, "Oh no, Mr. Denson, I intend to take a very definite part in the hotel." I said, "If we don't get together, you and I, how are we going to be able to draw up the lease with mother on the operation of the hotel?" Mr. Denson says, "You will recall I already have the contract with your mther. I intend to make it stick." I said, "Mr. Denson, how about our agreement, whereby you were to have 30 per cent of the hotel and I was to have 70 per cent of the hotel?" He said, "Oh, that, well, it is 50-50 now." I told Mr. Denson if that is the way he felt, I couldn't do any business with him.

Q. Hasn't Mr. Denson always insisted, when this matter came up, that it was a 50-50 arrangement?

A. Not until that time. It has always been 30-70, been agreed [698] upon.

Q. In the presence of anybody else?

A. In the presence of my mother.

Q. In the presence of anybody else?

A. It was never discussed in the presence of anybody else.

Q. Well, you heard Mr. Denson's testimony here, didn't you? A. Yes.

Q. Didn't you tell Mr. Denson that you were offered, that your mother was offered, an appreciable sum of money for the gambling rights in the sky room and that is why you did not want to go on with him with the lease?

(Testimony of Charles W. Mapes, Jr.)

A. Absolutely not.

Q. Absolutely not? A. No.

Q. As a matter of fact, do you know whether your mother has been offered anything of that sort? A. Been offered what?

Q. Any appreciable amount of money for the gambling privileges in that hotel? A. No.

Q. No offer of that kind has been made?

A. None.

Q. And you are very certain about that?

A. To my knowledge I don't know of any.

Q. Never heard of it if there is? [699]

A. No.

Mr. Platt: I think that is all.

Examination

By Mr. Cooke:

Q. This meeting that you had with Mr. Denson at the Sir Francis Drake Hotel, that was on the same afternoon of the same day that you met at the Levington Hotel, is that true?

A. What date is this, Mr. Cooke?

Q. Well, I think that is January—no, that is April 1st you were telling about, if my notes are right, that you had a meeting April 1st at the Drake. Is that right, that this meeting that you had with Mr. Denson alone in the afternoon was a continuation, so to speak, of the meeting that you had in the forenoon of April 1, 1946, at the Sir Francis Drake Hotel?

(Testimony of Charles W. Mapes, Jr.)

A. It was the same day.

Q. The afternoon of the same day?

A. It was all on April 1st, yes.

Q. The meeting at the Drake Hotel was in the morning?

A. No, April 1st the meeting was at Mr. Moorehead's office in the morning and then we had a meeting in the afternoon at the Sir Francis Drake on April 1st.

Q. And that is where you and Mr. Denson met alone, nobody else being present?

A. I went to his room and just Mr. Denson and myself.

Q. And the conversation that you related took place in his [700] room?

A. That is right.

Q. What was the occasion or reason for you and he getting together in the afternoon at that time? Hadn't you finished your business in the forenoon?

A. Well, his meeting in the afternoon wasn't related to the meeting in the forenoon at all. I was trying to get together with Mr. Denson so that he and I could get our association for the hotel written down.

Q. Did you make an appointment with him to meet him at his room in the hotel in the afternoon?

A. Yes, I think I did.

Q. What do you recall about the arrangements for that purpose?

(Testimony of Charles W. Mapes, Jr.)

A. I told Mr. Denson that I wanted to get together with him.

Q. You told him that in the forenoon?

A. I believe I did. And he invited me to his room when we got to the hotel.

Q. How long a time did this conversation in his room take place in the afternoon?

A. I believe about an hour.

Q. Had you and Mr. Denson ever discussed the terms of your partnership, prospective partnership, in the operation of this lease, outside of the 30 per cent and 70 per cent arrangement you already mentioned?

A. Did we discuss anything at all? [701]

Q. Yes, did you discuss what would go into this written partnership agreement if and when you entered into it?

A. Yes, I think at my discussion with Mr. Denson the fact that I wanted the right to buy out his interests in case anything should happen to him, being an older man and his life expectancy being shorter than mine. I think that was agreed with Mr. Denson and myself if anything happened like that, I would buy his interests in the hotel.

Q. How about your interest, was anything said about that, who wished to get that in case you dropped out of the picture?

A. I don't believe that was brought up.

Q. Well, that was one of the things. Then this 30 and 70 per cent division matter was discussed

(Testimony of Charles W. Mapes, Jr.)
as you already testified. Do you recall anything else?

A. It was very difficult to pin Mr. Denson down. Each time I saw him he was going away some place and we never could definitely get together. He was always coming back to Reno to get together with us and never could get together.

Q. Was the matter of both of you, he and you together, giving your time and attention to the business of running the hotel, discussed between you and Mr. Denson on any occasion?

A. Mr. Denson at one time mentioned to me the fact that he would like to be managing director and have that appear on the stationery and hotel. He thought he ought to be entitled to that because he had more experience in the hotel business than myself. I said, "Oh, no, Mr. Denson, I am not going to give you full control of the hotel, but I want you to participate with me and I will give due credit to any of your experience and appreciate any suggestions you have, but I can't let you control the policy of the hotel."

Q. What did he say to that?

A. He said, "Well, it isn't necessary and I won't insist on it."

Q. You told counsel in your testimony that this occasion in the afternoon in the room that you already mentioned, was the first time he said anything about division of 50-50 of the proceeds of this partnership or prospective partnership business. Is that correct?

(Testimony of Charles W. Mapes, Jr.)

A. That was the first to my knowledge, yes.

Q. Before that you told us that it was always 30 and 70, 30 to him and 70 to you?

A. That is what we agreed on, yes.

Q. How many different times, if you can tell us, was that specific division, those figures mentioned, 70 per cent to you and 30 per cent to him, previous to the time of this meeting?

A. It was agreed on at the meeting at the Levington Hotel and it was later verified in front of mother around September 22nd, before we signed the preliminary agreement, the three of us signed the preliminary agreement. [703]

Q. On two occasions?

A. There were two occasions. Of course it was considered by us that is the way it was all the way through.

Q. Do you recall those particular figures being discussed on any other occasion except those two?

A. I think we mentioned it since then. I don't definitely recall. I think it was mentioned at this meeting at the Levington Hotel on December 28th.

Q. Did Mr. Denson, during any of those conversations where the 30 and 70 per cent division was discussed, make any objection to it? Criticize it in any way?

A. No, that is what we had agreed on.

Q. You stated on your examination by plaintiff's counsel a moment ago that you did not know that Mr. Denson was consulting with Barker Bros. in regard to lay-outs and equipment for the hotel. Do

(Testimony of Charles W. Mapes, Jr.)

I have that right? You didn't know until you had this meeting with him about April 1st?

A. No, he called me previous to that time and told me he had this party, this interior decorator, who had been working on the interior plans for the hotel, four or five days previous.

Q. Then is it correct to say that down to four or five days previous to April 1st, 1946, you did not know anything about his consulting with Barker Bros. upon that matter?

A. Yes; I did not know anything about it.

Q. When did you first learn that he was consulting with anybody [704] in regard to possible equipment or even arrangements for equipment for the hotel, with Barker Bros. or anyone else?

A. Well, of course, I knew about Barker Bros. after the April 1st meeting and it wasn't until about the middle of April or the first of May that I went out after furnishings on my own that I found out Mr. Denson had contacted these other firms.

Q. On April 1, 1946, you didn't know he had contacted anybody at that time except the Barker Bros., is that correct? A. Yes.

Q. And you learned of his contacting the other parties later on when you went to see the same people? A. Yes.

Q. Is that how you learned of it?

A. I didn't get your question.

Q. How did you learn he was contacting these other parties subsequent?

(Testimony of Charles W. Mapes, Jr.)

A. They told me Mr. Denson had been there previously.

Q. Did you learn from Mr. Denson that he had contacted anybody except the Barker Bros., as you have already told us, prior to April 1, 1946?

A. I believe the Barker Bros. was the only one that was mentioned.

Q. Going back to October 4, 1945, some questions were asked you in regard to the signing of the agreement at my office. You remember that occasion, do you? [705]

A. Yes.

Q. Were you there throughout during the entire meeting, that is to say; when Mr. Denson and your mother left, did you go with them or did you go out before? Can you tell us about that?

A. As far as I recall now, I think I was there all the time.

Q. Did you hear Mr. Denson say to me during that conversation, or during any state of it, for me to draw the lease and he would sign it?

A. No, he did not say that.

Q. With regard to date April 10, 1946, that counsel has asked you about, you remember the meeting that was had in my office, yourself and Mr. Denson and myself being there?

A. On April 10th?

Q. Yes, either April 10th or 11th, I am not sure exactly which.

A. I think Mr. Denson was there and myself and you were present.

Q. At that time do you recall what, if anything,

(Testimony of Charles W. Mapes, Jr.)

I said to him about returning to him this ten thousand dollars?

A. You offered to tender his ten thousand dollars back to him and Mr. Denson said something to the effect, "I won't accept it. I have a contract here and I want to go through with it."

Q. Do you recall my saying anything to him that he better get himself a lawyer?

A. I think he did mention to you that you couldn't represent these people and himself, that before he went any further he [706] would have to get a lawyer.

Q. I said that to him?

A. I think he said that.

Q. That I said it?

A. Yes.

Q. Calling your attention to date September 24, 1945, when the preliminary agreement was signed, or at least was drafted and discussed in the office, do you remember anything being said by me to Mr. Denson by way of a question as to why the preliminary agreement, when it was contemplated, the lease should be drawn in a few days?

Mr. Platt: I think, your Honor, I ought to exercise Mr. Cooke's personal professional privilege. If he persists, if the Court please, in injecting his own testimony in the case, I certainly will persist that he is waiving his personal professional privilege. I object to any such questions without presenting any law.

The Court: I think if that examination persists along that line, you have an opportunity to examine

(Testimony of Charles W. Mapes, Jr.)

him and go fully into all the questions and all matters pertaining to the subject testified to by this witness that have come from Mr. Cooke.

Mr. Platt: Well, with that understanding——

The Court: I grant that permission if you desire. [707]

Mr. Cooke: My understanding in regard to privileged communications is this, that where communication is made in the absence of the third party, in this case Mrs. Mapes, it isn't privileged. I could claim any privilege if I wanted to in regard to this. That is the reason I feel free——

The Court: I think later, if counsel wants, he will have opportunity to examine on any of these questions.

Mr. Cooke: It is all right with me, your Honor. Concerning this other privilege, of course, the privilege applies to my client, but so far as I am permitted, I will be glad to tell all I know about the matter at any time.

Mr. Platt: Your Honor will recall I asked Mrs. Mapes whether she had any conferences with Mr. Cooke before she signed this agreement and was stopped on the question of professional privilege. I propose to show to your Honor a little later that Mr. Cooke has made himself a witness in this case.

The Court: Well, I agree with that insofar as any matters that have been brought out here by any witness, as to those matters and any matters

(Testimony of Charles W. Mapes, Jr.)
necessarily connected with them. I think otherwise it would be a one-sided proposition. Read the question.

(Question read.) [708]

Mr. Sinai: If the Court please, may I interject this objection, that according to the statement by Mr. Cooke, according to the question which he has propounded to the witness, Mr. Cooke is precluded from interrogating further unless he obtains the consent of Mr. Denson, who also has the right to exercise that privilege. The prior question was to the effect that did you not, Mr. Mapes, hear me tell Mr. Denson that he would have to get another lawyer from now on, up to that point and that is if prior Mr. Cooke must have been attorney as well for Mr. Denson, so therefore, if there is any privilege in this case it appears to me that Mr. Denson would be the one who would have to consent to Mr. Cooke's introduction.

The Court: That sounds reasonable, if that is the situation.

Mr. Sinai: That is the situation.

Mr. Cooke: I deny it.

The Court: Why was the statement made in regard to getting another lawyer?

Mr. Cooke: Getting his own lawyer. I was never employed by Mr. Denson for a single minute. There is no testimony, not a scrap of it, that indicates anything of the kind. He came into my office as a stranger brought in there by Mrs. Mapes,

(Testimony of Charles W. Mapes, Jr.)

that is the evidence so far, and I drew the paper up as counsel for Mrs. Mapes, and that is what he states in his own affidavit. [709]

The Court: I don't think, coming right back to the root of this thing, I don't think Mr. Denson was in there depending entirely upon Mr. Cooke for legal advice. He came after consulting with Mr. Young in either San Francisco or Oakland. Mr. Young had been his attorney for 25 years. Mr. Young had prepared this original draft and it isn't to be assumed that Mr. Young didn't—Mr. Denson's testimony was that it was prepared in Mr. Young's office.

Mr. Sinai: That is right. It was based on the question propounded by counsel that he said he better get a lawyer.

The Court: I am not inclined to consider Mr. Denson as a man sitting depending upon the advice of the other person's attorney, because I think he was well fortified with advice by Mr. Young. That is my impression. It does not seem to me that a lawyer who has served a client for 25 years, who is permitted so recently to type a contract on an important business matter, also should not have been consulted, or wouldn't at least have knowledge, this good client of his for 25 years, in the matter.

Mr. Sinai: I based it on this statement that he was [710] not acting for Mr. Denson. I would prefer to withdraw it.

The Court: At one time the thought was in my mind that perhaps Mr. Denson had consented that

(Testimony of Charles W. Mapes, Jr.)

Mr. Cooke act for both parties in this matter, but when he came in there armed with the draft, at least a substantial part of this present agreement, I don't think it could be considered as having acted on Mr. Cooke's advice in this.

Mr. Sinai: We submit it to the Court.

The Court: That is my view of it.

(Question read.)

The Court: Objection will be overruled and answer the question.

A. I believe he did mention something to that effect to Mr. Denson. Mr. Denson said at that time he was very anxious to have it signed because he wanted to have something to show.

Mr. Platt: What do you mean, to have the lease signed?

A. Not the lease. This is the agreement, as I understood the question.

Mr. Cooke: The document of September 24th.

A. The document of September 24th, isn't that the question?

Mr. Cooke: That is the one I was talking about.

(Question read.)

A. You have me confused. Are you talking about the lease or [711] the September 24th agreement?

Q. Talking about the preliminary agreement, September 24th, when that was discussed there. At the time the party broke up, if you remember my making

(Testimony of Charles W. Mapes, Jr.)

that statement to Mr. Denson, or asking him that question, as to why we should go through with this agreement here when it was contemplated a lease should be drawn up in a few days?

A. I remember Mr. Denson stating the reason was he wanted the preliminary agreement signed at that time because he wanted to show something definite.

Q. Who were present there beside you and me on that occasion, in the room so they could hear the talk?

A. My mother was there and possibly your secretary, Miss Yparraguire. She was in and out.

(Short Recess.)

MR. MAPES

resumed the witness stand on further examination by Mr. Cooke.

Q. Counsel for plaintiff asked you some questions in regard to discussions about the gambling in the sky room and you answered him. Do you remember what meeting that was, Mr. Mapes, where that talk was had between you and Mr. Denson?

A. I never told Mr. Denson about any offers.

Q. Well, the question was asked you in regard to talk with Mr. Denson and you answered. What I am trying to identify was the meeting you are referring to the meeting of April 1st that [712] was down at San Francisco, you testified, at the time Miss Mason was up there, during that meeting or

(Testimony of Charles W. Mapes, Jr.)

on that occasion, whether at the same time or later on, was the matter of this sky room and the gambling privileges discussed in any way between you and Mr. Denson?

A. Nothing was mentioned about that at that meeting?

Q. When you say at that meeting, was that the time you had one meeting in the forenoon and another one in the afternoon with Mr. Denson, where you had your conversation about the 30 and 70 per cent?

A. Oh, there was something mentioned about the sky room at the meeting in the morning. I think I did mention something about the sky room at the meeting in the forenoon, but it didn't have anything to do with the gambling.

Q. Did you hear Mr. Denson's testimony in regard to your stating to him on this meeting, I think it was, that you had received some big offer for the sky room? Do you recall his testimony about your offer for gambling purposes?

A. That was his testimony.

Q. I am asking you if you heard his testimony?

A. Yes.

Q. Was there any such conversation ever had?

A. No.

Q. In which you made any such statement of that kind to him? A. No. [713]

Q. Either at that time or at any time?

A. I did not.

(Testimony of Charles W. Mapes, Jr.)

Q. I show you defendants' Exhibit 1 for identification and ask you to look that over and see if you recall anything about how it came to be made up in its present form, in the form that it is there?

A. I believe this is a copy of the agreement that Mr. Denson brought up to Reno. He had three copies and I think this is one of the copies of the agreement he had made up.

Q. Well, there are some interlineations and yellow sheets attached there. Were they part of it when he brought them up?

A. These yellow notes, as I recall, were pencilled by you in your office.

Q. Where and under what circumstances? Who were present at the time and what time was it?

A. As far as I recall, I think it was September 24th.

Q. 1945? A. 1945.

Q. Who were present?

A. Mr. Denson was present and mother and myself and Mr. Cooke.

Q. And what do you recall as to any discussion being had of the various matters, lead pencil interlineations and yellow sheets attached there? Were they discussed by the parties or not?

A. By all of us and the interlineations were discussed by all [714] of us.

Q. Did anybody raise any objection to them in any way at that time?

A. I don't believe so.

Q. Do you remember what was said at the con-

(Testimony of Charles W. Mapes, Jr.)

clusion of the discussion about the changing of the typewritten document that Mr. Denson prepared? What was said as to what was going to be done then and who was to do it? Was anything said about redraft or anything of that kind?

A. I didn't understand the question.

Q. Was anything said about redrafting the document with the changes, the lead pencil changes on the yellow sheets?

A. Yes, we all agreed on these changes that had been discussed and had been pencilled in.

Q. You stayed there throughout the meeting, did you? A. Yes.

Q. Aside from the lead pencil interlineations and yellow sheets attached, is that document, so far as you know, in the same form as it was when Mr. Denson handed it to you or your mother at your house? A. Yes, I believe it is.

Q. Where did you first see it?

A. Mr. Denson—I was with him and he showed it to us on September 22nd and 23rd, the day or two before.

Q. The day or two before you were up to the office? [715] A. Yes.

Mr. Cooke: We offer the document in evidence, your Honor.

Mr. Platt: Same objection, your Honor. Nobody knows yet anything about the interlineations and they manifestly are not made a part of the final agreement that was entered into and they are certainly immaterial; can't be binding on anybody.

Mr. Cooke: Well, in answer to that, your Honor,

(Testimony of Charles W. Mapes, Jr.)

I am frank to say that for once I shall agree with Mr. Platt, but in view of the fact that they have gone so much into the past, for instance, as to what took place before, it seems to me that your Honor should have this as part of the document. If it has any sort of fundamental value at all, we should have it complete and here is presented in a fairly tangible form what the parties discussed and how they finally reached the agreement, the draft of which is the September 24th agreement. So far as the lead pencil interlineations are concerned, those are testified to have been made by me in every instance and the yellow sheets are attached the same way, so when you have this document with the folders, you have the document as first presented by Mr. Denson, plus those interlineations made by myself in lead pencil, as testified, and agreed upon by the witness. It seems to me it might be some help to the Court to understand what was done there and how it was done.

Mr. Platt: May I presume to submit to your Honor [716] what I think the picture is?

The Court: Yes.

Mr. Platt: There is no question from the evidence that the original draft of a proposed agreement was submitted by Mr. Denson. There is no question from the evidence but that the draft was considered by Charles Mapes and his mother for at least two days before. There is no question from the evidence that that draft was presented to Mr. Cooke, attorney for the defendants, in his office, and

(Testimony of Charles W. Mapes, Jr.)

there is no question that, in accordance with the understanding and the draft and everything else, that went with it, Mr. Cooke himself put in final form this agreement which has been introduced in evidence here and which has been signed by all the parties. Mr. Denson didn't draw this final draft. Mr. Cooke drew it and certainly, as attorney for the Mapes, that final draft of the agreement contains what those parties agreed to and any notations by Mr. Cooke made beforehand certainly are immaterial.

The Court: I am inclined to agree with you. The objection will be sustained. Inasmuch as testimony has already been admitted concerning matters which took place before and after the signing of the agreement of October 4th, I would see no valid objection to bringing in by way of what took place there the substance of matter of those interlineations, their written [717] statements there, if they were matters that were discussed between the parties at that time, just as we have admitted matters that were discussed at different times before that agreement. I can't see where there would be any difference in admitting the evidence we have admitted as to matters which have taken place prior to the signing of October 4th agreement and the admission of testimony concerning the subject matter of those pencilled statements.

Mr. Cooke: That is what I thought, your Honor, if I understood. I thought it would come in under the same principle.

(Testimony of Charles W. Mapes, Jr.)

The Court: Can you point out any distinction?

Mr. Platt: Well, if your Honor please, notations made by an attorney——

The Court: (Interrupting) I am not talking about notations, but they can use them to refresh their memory and bring out the testimony.

Mr. Platt: As far as the evidence with respect to conversations they covered, I wouldn't offer any objection, but here is offered in evidence a tentative form of agreement with notations made by an attorney, which is a very different thing.

The Court: The objection will be sustained as to admission of that exhibit with those pencilled [718] additions, but I would not be adverse to permitting testimony of conversations, if there were any conversations, that involved the subject matter of this.

Mr. Platt: We wouldn't offer any objection to such evidence.

Mr. Cooke: I thought the foundation had been laid, if your Honor will permit just a moment, by different witnesses testifying how it was made and that even pencilled interlineations—I don't care who made them, by me, attorney for the Mapes or who they were made by, somebody made them—were agreed to and discussed at that time and whether I was acting as attorney for one side or the other would be entirely immaterial in any event, so that the client I was representing agreed and the other party agreed to the changes. I thought when I put

(Testimony of Charles W. Mapes, Jr.)

in that evidence, that laid the foundation for the document, so far as it goes. I am disposed to agree with counsel, that all of that matter is irrelevant and immaterial, but inasmuch as some of it went in, it seems to me only fair that all should go in and that this is even more important and more persuasive and convincing than oral conversation, because here we have something in permanent form and in the same form to which the parties agreed to it. They identify and establish its features as part of the history of this contract and transaction that occurred immediately before they signed, so if it is important at all, this [719] ought to be tremendously important. Of course my notion is, I will say frankly to your Honor, that none of that matter that occurred prior is material, but your Honor has taken a different notion and I am not questioning the propriety of it at all, but it seems to me all should go in. That is why I have been rather persistant about this, over-persistant, about this particular material.

The Court: Let us consider it well. Mr. Platt, your view is that you have no objections to the statements by the witnesses, if they could so testify, as to the subject matter or contents of those additions to the agreement?

Mr. Platt: I have been trying to take a consistent position, your Honor. I have no objection to conversations which occurred in the presence of Mr. Denson and, of course——

(Testimony of Charles W. Mapes, Jr.)

The Court: (Interrupting) Suppose it should appear that these written additions were made in the presence of Mr. Denson, were exhibited to him and discussed by him. I am not arguing—the testimony might be contradictory on that point, but supposing it was testified by the defendants' witness or any of the plaintiff's witnesses present at that meeting, without passing upon the truth or falsity of the statements, that they might make, or truth or falsity of what is [720] in those written notations—it was testified by a witness for the defendant that that conversation occurred embodying the substance of these written notations, you would not object to that testimony. What difference does it make then whether these are offered or not? What is the point you have of any objection to the offer?

Mr. Platt: The objection is that they were notations made by the attorney in the first place, and secondly, they were notations made by an attorney who, himself, drew up the final agreement and the law, or rather the inference, in equity and law is so strong that this agreement signed by Mrs. Mapes, the next day or two days afterwards, embodying what the parties agreed upon, the inference is so strong that such a document reflects upon the verity of the instrument itself. I am keeping in mind, if the Court please, that this final agreement was drawn by the same attorney who made the notations, according to what we know, and that he had Mrs. Mapes come up and sign it, this final agreement,

(Testimony of Charles W. Mapes, Jr.)
and the only purpose of such particular testimony is to repudiate the contents of the final agreement, which he himself drew.

The Court: The purpose in admitting all the testimony that I have permitted to go in, I might say on the parties' construction of this contract and the preliminary negotiations, was not [721] at all to be construed for or against the suitability or standing of this contract. The idea of the matter, as far as I am concerned, is that that contract stands as it is written, but only for the purpose of being able to decide some of these questions that have been raised here. For instance, the question of whether that provision in regard to time was violated and whether the equities of the case are such that specific performance should be granted and just to get the picture of the case and of the construction of the parties placed on the contract. My view of it is that this contract stands. It has to be considered just as it is written, that is my view, and if that was admitted it wouldn't make any difference what he said or did not say, it wouldn't take the place of that contract. That is my construction of this case.

Mr. Platt: Your Honor, our theory in producing evidence here is in accordance with the pleadings in the complaint. In other words, we plead a waiver of the time elements of the contract and we also plead estoppel. Now the only method by which we can establish that plea is to produce evidence here

(Testimony of Charles W. Mapes, Jr.)

showing not only the conduct of the parties preceding and subsequent [722] to the entering into of the agreement, but the statements made by the parties, the continuation of the acts by the parties, not only from a long distant time of the agreement, but to subsequent times, as we have endeavored to show here in the month of April, a short time ago. Now that is the purpose of our endeavoring to get in additional evidence, in order to establish the doctrine of equity and estoppel. We pleaded it and we have to prove it and that is why we have asked the indulgence of the Court to prove it and the Court had determined, of course, that this evidence for that purpose is admissible. As far as equities of the case are concerned, it is also necessary for us to establish that we are doing equity and we are ready to do equity and that can only be established through oral testimony. Now that is our position, but this evidence which is being admitted now does not bear upon either of those contentions or any of them.

The Court: Another thought that occurred to me just now is that that places Mr. Cooke in a position here of confirming the statements that these witnesses might make. It makes him, in a sense, a witness. A document written by him, a sort of narration of the conversations that are alleged to have taken place there and then there is presented here in court statements that he wrote with the understanding that they were written [723] down in the presence of the parties, makes him a witness

(Testimony of Charles W. Mapes, Jr.)
in this case. I will stand on the ruling heretofore made. The objection will be sustained.

Mr. Cooke: Of course, we may want to recall Mr. Mapes in our case in chief but I believe at the present time cross-examination, if so it may be called, will be waived.

The Court: Have you any questions at this time, Mr. Platt?

Redirect Examination

By Mr. Platt:

Q. Mr. Mapes, I don't recall whether I asked you this question, but I think I did. You are stating, according to your understanding and your testimony, that you are to receive 70 per cent of the proceeds of the lease or had a 70 per cent interest, and Mr. Denson had a 30 per cent interest. Do you mean by that that you were to pay 70 per cent of the cost and expense for furnishing the hotel and Mr. Denson was to pay 30 per cent?

A. I believe I testified previously to the fact that we never definitely could get Mr. Denson together on that, but so far as I was concerned, I was willing to put up 70 per cent of the cost.

Q. Have you ever operated a hotel?

A. No sir.

Q. You have had no hotel operating experience at all?

A. The family has operated several hotels in Reno.

(Testimony of Charles W. Mapes, Jr.)

Q. Have you ever personally operated any hotel?

A. I have assisted in the operation of 100 rooms.

Q. Where was that?

A. The Mapes Building.

Q. That isn't a hotel, is it?

A. No, but there are rooms and apartments. I do not claim to be an experienced hotel man, no, if that is what you mean.

Q. As a matter of fact, you don't know much more about it than I do?

Mr. Cooke: Objected to——

The Court: Objection sustained.

Mr. Cooke: I object to any question in regard to experience of the witness as being a hotel man. I do not think it is any issue in the case here.

Mr. Platt: We will see when the time comes. It is up to the Court when questions are asked.

Mr. Cooke: I make my objections to the Court.

The Court: There is no question before the Court.

Q. You talk about a conversation you had with Mr. Denson about the operation of the hotel, I mean the Mapes Hotel, if and when you and he operated it. You mentioned some conversation, the conversation that you had in that respect?

A. Yes. [725]

Q. Now to get right down to the question of understanding, was it your understanding that because of Mr. Denson's conceded long experience as a hotel operator, that he would in fact operate

(Testimony of Charles W. Mapes, Jr.)

the hotel along with you and make the proper suggestions, so that the hotel could be operated properly? Is that what you understood was going to be the fact and the condition?

A. It was understood that Mr. Denson, being older, would be well able, the two of us would be well able, to operate the hotel together.

Q. And did Mr. Denson ever state to you in any conversation that he ever had with you that he wasn't always ready and willing to cooperate with you in the management and operation of the hotel if you succeeded in getting it?

A. He stated I believe, as I testified previously, that he wanted to be the managing director and have his name appear wherever the hotel was mentioned and have control of the policy.

Q. Was that to the exclusion of you? Is that the way you understood it?

A. I told him I wouldn't agree with that.

Q. Did he represent to you that he was going to exclude you from the proposition of the operation of the hotel?

Mr. Cooke: I would like to interpose an objection to this, that this goes to the question of relation between [728] the witness and Mr. Denson and their partnership arrangement and certainly there is nothing in this case that involves the proposition that your Honor authorize specific performance of that. I do not think any court could compel anybody who did not want to do performance to per-

(Testimony of Charles W. Mapes, Jr.)

form it. It seems to me we are wasting time hearing testimony regarding squabbles and conditions between two prospective partners. Your Honor can't make any order in regard to it, any more than Irene Gladys Mapes can be compelled to specifically perform.

Mr. Platt: I submit the question is based upon the answer or answers given by the witness in reply to questions propounded by his own attorney.

The Court: The objection will be overruled. You may answer the question.

(Question read.)

A. Mr. Denson never properly considered me. That is one of the reasons we couldn't get together. He thought I should go away to law school and when it came to the operating function, he considered me as a kid, which I resented.

Q. Well, isn't it a fact that Mr. Denson, upon many occasions, said to you, "Charles, I have had a lot of experience as a hotel operator. We will go in and go along together until you get some experience and in the meantime we will work together and I will do most of the operating because I am experienced, but I am not shutting you out of equal privileges with me." [727] Now hasn't he said that to you repeatedly?

A. He said repeatedly that he wanted to handle the operation of the hotel himself and when we had the April 1st meeting, he didn't consider me

(Testimony of Charles W. Mapes, Jr.)
at all in the operation of the hotel. So far as I was concerned, I was to be miles away, going to law school.

Q. Who was present when he made such a statement to you?

A. That was in Mr. Denson's room, just he and I.

Q. Nobody else there, was there? A. No.

Mr. Platt: That is all.

Mr. Cooke: No further questions.

Mr. Platt: Call Mr. H. R. Cooke, attorney for the defendants, as an adverse witness. [728]

MR. H. R. COOKE

being first duly sworn, testified as follows, as an adverse witness:

Direct Examination

By Mr. Platt:

Q. Will you state your name, Mr. Cooke?

A. H. R. Cooke.

Q. You are practicing attorney here in Reno, Nevada? A. Yes sir.

Q. And have been for many years.

A. Yes sir.

Q. You are attorney for the defendants in this action? A. Yes sir, one of them.

Q. Which one?

A. I am one of the attorneys for the defendants in this action.

(Testimony of Mr. H. R. Cooke.)

Q. You have been an attorney for Irene Gladys Mapes, one of the defendants, for many years?

A. Quite some years. Since her husband died and before.

Q. And were you her general counsellor and adviser on legal matters with which she was concerned?

A. Well, I think so. She has had one other attorney during that time but aside from that one instance, I think I have acted in that capacity exclusively.

Q. I hand you a file record in the case, purporting to be the affidavit of H. R. Cooke, supporting the defendant's motion to dismiss and for summary judgment, filed on July 11, 1946, and will ask you if you signed and filed such an affidavit? [729]

A. Yes, that is my signature and my work.

Mr. Platt: I offer it in evidence, your Honor.

The Court: Any objection?

Mr. Cooke: Objected to as incompetent, irrelevant, and immaterial, affidavit as to what expired at the time and shortly before the drafting of the September 24th agreement. It covers more or less the same subject matter that is expressed in Defendants' Exhibit 1 for identification, which has been objected to. I object to it upon the grounds it is immaterial.

The Court: What is the purpose of this offer, Mr. Platt, of the affidavit?

Mr. Platt: Well, I desire to establish by it

(Testimony of Mr. H. R. Cooke.)

what actually did occur when Mr. Denson came to Mr. Cooke's office prior to the signing by Mrs. Mapes of the agreement entered into; at least, what did occur according to Mr. Cooke's statement.

Mr. Cooke: I withdraw the objection, your Honor.

The Court: It may be admitted in evidence as Plaintiff's Exhibit "Q."

Mr. Platt: And I desire to read it in the record.

(Reads Exhibit "Q".)

The Court: What is the date of that affidavit please? [730]

Mr. Platt: July 10, 1946.

Q. Calling your attention to this statement in the affidavit: "With the statement that said document had been prepared by him and that it represented what the parties had agreed upon." Did you believe that statement?

A. I think it is immaterial whether I did or not, your Honor. May I be allowed to make an objection on the witness stand?

The Court: You may make your objection.

A. I would say yes—I don't object.

Q. Well, did or didn't you?

A. What is that statement again?

Q. "With the statement that said document had been prepared by him and that it represented what the parties had agreed upon."

A. Yes, I understood that they had a discussion preliminary to coming to the office upon the mat-

(Testimony of Mr. H. R. Cooke.)

ters there and it was further discussed at the office and that document there, as I recall it, was handed to me by Mr. Denson as a form of agreement that he had used in some other occasion. I don't know exactly what he said.

Q. Was anybody else there in your office when Mr. Denson presented that?

A. Yes, I think Mr. Denson and Mrs. Mapes and Charles were there. I note in there that I stated that Charles wasn't there. Charles did not, as I recall, did not take very much part [731] in that. Mr. Denson did about all the talking, and myself, I got in a word once in a while.

Q. Then the affidavit proceeds: "That said document was submitted to affiant for the sole purpose of his re-drafting same into better legal phraseology and also that a number of carbon copies might be made for convenience of the parties," is that true?

A. Yes.

Q. "The affiant thereupon made a redraft, a copy of which is annexed to plaintiff's Complaint as Exhibit A," is that true?

A. Yes, that is right.

Q. " * * * with the required number of carbon copies; that save as herein stated and shown, the said Exhibit A annexed to plaintiff's Complaint was prepared by the plaintiff P. G. Denson and not by any attorney for defendants or either of them." Is that true?

A. That is right.

Q. But that draft that you prepared, what did you later do with it?

(Testimony of Mr. H. R. Cooke.)

A. Well, speaking from recollection only, without notes or any carbon copies or anything to refresh my recollection, as I remember Mr. Denson was anxious to have that matter mailed that night, have it redrafted and mailed and he gave explicit instructions about sending it to him in care of the Biltmore Hotel, I think is the hotel, and this was impressed upon my mind that he told me to mark the envelope "Please Hold," so it wouldn't follow him around and he would be sure to get it there and I think I got it off that night. I am not sure I did.

Q. I call your attention to Plaintiff's Exhibit "P" for [732] identification and ask you if that is the envelope with the contents of that agreement which was addressed as you say to Mr. Denson?

A. Yes, I would say so. It is my envelope and my return card, etc. The date of the mailing isn't shown, which would help me if I could tell it, but the instruction there—I only wrote him once I remember of. I think I only sent that one communication to Mr. Denson and that to the Biltmore Hotel and instructions "Please Hold" serves to identify that as the envelope I sent at that time, and I think included in the envelope were some three or four copies, that is my original impression, of the agreement of September 24th.

Q. I hand you what was purported to have been included in that envelope, an agreement dated September 24, 1945, and signed by Irene Gladys Mapes, first party.

(Testimony of Mr. H. R. Cooke.)

A. May I inquire if there are any more of these contained in that envelope? I do not remember sending just one.

Mr. Platt: That I do not know.

A. Well, I sent more than one. This may have been one of them, I don't know, I have no way of determining that, but it is quite probable this is one of them and I sent three or four more.

Q. Well, I call your attention to your signature as witness on that agreement, is that your signature? A. Yes. [733]

Q. And is that the signature of your secretary, Miss Yparraguire?

A. It is. I am speaking about the number of copies. There is no question about this document, but I don't remember sending just the one shown me.

Q. But you are certain about this, that this one was included in this envelope?

A. No, I can't say that particular one was, but I wouldn't say it wasn't either.

Q. No question about that being the signature of Mrs. Mapes? A. No.

Q. Or your signature? A. No.

Q. Or your secretary's signature?

A. No, those are all genuine.

Q. I can see a post mark "25/1945."

A. Is that Los Angeles or Reno? I think it was mailed that same night. That was received the 25th. Where is the Reno? With the glass, your

(Testimony of Mr. H. R. Cooke.)

Honor, it would appear—it is rather blurred and indistinct, but it would appear there is something 24, the month you can't tell, but the figure 24 appears there and then there is 194 blank there, but I would say that is the envelope and it was mailed on September 24th and received in Los Angeles, according to the stamp here, on the 25th.

Q. Now this agreement that I have handed you, signed alone by [734] Irene Gladys Mapes, was sent to Mr. Denson in accordance with his instructions to you?

A. Well, you say that agreement. I can't say that, Mr. Platt, except for the implication of the thing. If you ask for my recollection, I would say I sent three or four copies, as the case may be, unsigned, not signed by anybody, because my usual practice is to let the other party look at it before it is signed, but that one you have there is unquestionably signed by Mrs. Mapes.

Q. Do you know of any other agreement signed by her alone? A. No, I do not.

Q. Except the one you sent to Mr. Denson?

A. No, except that might have been signed at another date, at a later date.

Mr. Platt: Well, we offer it in evidence, if the Court please.

The Court: Any objection, Mr. Cooke?

Mr. Cooke: No.

The Court: Exhibit heretofore marked for identification now admitted in evidence as Plaintiff's Exhibit P.

(Testimony of Mr. H. R. Cooke.)

We will be in recess until tomorrow morning at 10:00 o'clock.

(Recess at 4:45 p.m.) [735]

Friday, December 13, 1946, 10:00 A.M.

Appearances same as at previous sessions.

MR. COOKE

resumed the witness stand on further examination by Mr. Platt.

Q. Mr. Cooke, Mr. P. G. Denson, the plaintiff in this action, was not in your office on September 24, 1945, is that true?

A. Yes, I think he was. It is my recollection.

Q. Well, you saw him on September 23, 1945, in Reno, didn't you?

A. My recollection is that the night before, that would be on a Sunday, I went down to Mrs. Mapes' home.

Q. What do you mean, Sunday, September 23rd?

A. Yes; and the thing was very informally mentioned about the lease. I don't know that any document was shown me down there. It may have been, and my recollection is that it was arranged then for them to meet again the next day at my office, or whether that was fixed at that time for the afternoon of the same day, I don't know. I think it was the afternoon of the next.

Q. Well, isn't it a fact that on September 24th,

(Testimony of Mr. H. R. Cooke.)

because of Mr. Denson's absence from Reno on that day, he said to you in effect to prepare the agreement and mail it down to him at the Biltmore Hotel at Los Angeles?

A. Yes, that was said on the 24th, in substance.

Q. Well, you prepared that agreement on the 24th, didn't you?

A. I think so. I am quite sure of that.

Q. And it was mailed out of Reno on the 24th, wasn't it?

A. Well, I am speaking from memory on those things, but I judge from the postmark on the envelope.

Q. That is what I am judging from.

A. I think I mailed it on the same day I made it. That is confirmed by the other documents there. I think that is right.

Q. It is a fact, isn't it, he wasn't in Reno in your office on the day that you prepared that agreement?

A. Yes. It was prepared on the 24th and my recollection is it was mailed on the afternoon of the 24th and this was discussed and these pencil notations were made that you refer to.

Q. Isn't it a fact that a conference was held on Sunday, September 23rd, and after that conference you saw no more of Mr. Denson in Reno, that he asked you to prepare the agreement and send it to him at Los Angeles and that you didn't see him at all after September 23, 1945, in Reno?

A. No, that isn't my recollection.

(Testimony of Mr. H. R. Cooke.)

Q. Are you certain that you had any talk with Mr. Denson in Reno after you prepared the final draft of the agreement?

A. Yes afterward, quite a while afterward April 10th of this year, I think the next time I think the next time I saw Mr. Denson.

Q. Let me put the question another way. Are you certain that you didn't see Mr. Denson in Reno any time during the month of [737] September, 1945, after you prepared the final draft that you sent to him?

A. Yes. I want to correct that other statement. I saw him October 4, 1945, along about then.

Q. Well, going back to my former question. Will you read it?

A. I answered it, that I didn't see him again in September.

Q. You didn't see him in September?

A. No.

Q. You prepared the answer, Mr. Cooke?

A. Yes.

Q. Beginning on page 14 there is set up an affirmative defense which you describe in the Answer as being "For a further necessary and fourth defense, the defendants allege and show that on September 24, 1945, it was contemplated and intended by all parties to said Exhibit "A"—which you will recall is the agreement. A. Yes.

Q. " * * * the plans of the proposed hotel structure, together with specifications for same,

(Testimony of Mr. H. R. Cooke.)

prepared by the Moorehead Company, should be annexed to said Exhibit "A" * * * which is the agreement," * * * and be approved in writing by the parties thereto within the time limit. That no copy of any plans or specifications were ever annexed to said Exhibit A and approved in writing by the parties." I am reading from a copy and if you have any doubt of the correctness of the reading, I [738] will get the original. At the time you prepared that agreement and mailed it to Mr. Denson, did you, yourself, make as a part of that agreement the plans and specifications to which you refer in the answer?

A. No. I think I was told they didn't have any then. We would have to go through without that, that is for the time being. There wasn't very much said about any plans or specifications. That is simply copied from Mr. Denson's draft. It wasn't discussed, as I recall it, especially.

Q. Then of course it is fair to say, isn't it, that if plans and specifications were not available at that time, Mr. Denson wasn't at fault for not having them attached to the agreement which you prepared?

A. No; I don't claim that he was, as I know.

Q. Well, you are setting it up here as an affirmative defense.

A. Well, it is introductory.

Q. The agreement, in the form in which it was

(Testimony of Mr. H. R. Cooke.)

sent to Mr. Denson, was prepared and stapled in your office, wasn't it?

A. Well, I didn't consider that agreement was prepared by me because I just copied Mr. Denson's, except in those respects that the parties wanted changes made, as shown by those lead pencil interlineations. It was partially prepared by me and partially prepared by Mr. Denson. About three-quarters of it, I think, was by Mr. Denson. [739]

Q. The mechanical preparation of that agreement was made in your office?

A. Yes, the retyping of it.

Q. When you all met later—by that I mean the plaintiff and the defendants, Mrs. Mapes and her son, Charles, in your office on October 4, 1945, and the agreement was executed by all of the parties in your office, the plans and specifications still remained unattached?

A. That is right.

Q. Did you suggest at that time that they ought to be attached?

A. No, I didn't know anything about it, further than I got the impression some way that there were not any plans or specifications to be attached, none prepared at that time. They hadn't started work and hadn't done anything. It seems to me it was a little too early to talk about it. It wasn't discussed in any definite way. I didn't see at any time any plans and specifications around my office.

Q. And you personally, as attorney for these defendants, have never made a demand upon Mr.

(Testimony of Mr. H. R. Cooke.)

Denson to have those plans and specifications attached to the agreement?

A. No, I don't think that was part of my duty.

Q. Well, have you ever advised the defendants to so inform Mr. Denson?

A. No. From October 4th, when the document was signed, down [740] to April, either the 1st or 10th, of the following year, that is of this year, I don't think I have heard of the Denson-Mapes transaction. I wasn't consulted about it in any way that I remember at all during that entire time as to its status or what could be done about it or what was to be done or anything, is my recollection of that. I supposed that everything was going along all right.

Q. That was your supposition?

A. Yes, from the fact that I didn't hear anything about it.

Q. I desire also, Mr. Cooke, to call your attention to subdivision (b) of defendants' Answer, on page 15 thereof, which reads as follows and which you set up as an affirmative defense in this action. This subdivision reads as follows: "That the \$20,000.00 cash required by Paragraph I of said Exhibit A, to be deposited by the said Charles W. Mapes, Jr. and plaintiff, P. G. Denson, as a guaranty of their good faith, was not deposited contemporaneously with the making of said Exhibit A or at all, except that \$10,000.00 was deposited on or about October 4, 1945, but the remaining

(Testimony of Mr. H. R. Cooke.)

\$10,000.00 has never been deposited or tendered to said defendant, Mrs. Charles W. Mapes." Now with respect to that allegation, at the time of the signing of that agreement by all the parties on October 4, 1945, did you, on behalf of Mrs. Mapes or did you hear her, on her own behalf, make a demand upon Charles W. Mapes to pay that \$10,000.00? [741]

A. No.

Q. From the time of the execution of this agreement on October 4, 1945, have you notified Mr. Denson, the plaintiff in this action that the \$10,000.00 had not been deposited by Charles W. Mapes?

A. No, there was no notice that it hadn't been deposited by Charles W. Mapes, but there was a notice it hadn't been deposited.

Q. What?

A. I say he was notified it had not been deposited, the remaining \$10,000.00 had not been deposited, as I remember.

Q. I just don't understand your answer.

A. Well, I had to answer the question the way you put it.

Q. Will you repeat your answer?

A. I did not notify him that Charles W. Mapes had not made a deposit.

Q. I don't know what you mean by that. Maybe the Court does, but I don't.

A. Just what I say, that the ten thousand dollars had not been put up.

(Testimony of Mr. H. R. Cooke.)

Q. My question was that you had never notified Mr. Denson up to the present moment? Let me withdraw that. You have never notified Mr. Denson, until his attorneys were served with the copy of the answer, that the ten thousand dollars had not been deposited by Mr. Mapes? [742]

A. Well, that isn't any notice it hadn't been deposited by him.

Q. May I have an answer to the question?

A. Read the question and I will see what I can do. I will answer it the best I can.

(Question read.)

A. No, I never notified him that Mr. Mapes had not deposited the ten thousand dollars.

Q. You said, Mr. Cooke, that no plans and specifications had been prepared or were available to attach to the agreement?

A. Well, I didn't know of them.

Q. You didn't know of them?

A. I didn't know of them. I never saw them and didn't think there were any at that time.

Q. Do you know when they first became available?

A. No, I do not. I did not have much to do with that phase of it. Just a few little questions that came up from time to time that I was consulted on. I didn't work with the building, the progress of it. The architect, etc., did that.

Q. But Mrs. Mapes never sought your legal

(Testimony of Mr. H. R. Cooke.)

advice, as I understand it, after this agreement was entered into, until when?

A. Well, I am speaking from recollection again, I think I am correct. I do not think it was until along in April. It may have been around the first and again it may have been the 10th. It appears at the time there had been some sharp differences [743] arising between Mr. Mapes and Mr. Denson. That may have been after the 10th. The testimony can tell here, but it was around the fore part of April, I think was the first time I heard anything in regard to that agreement between them, Mr. Denson and Mr. Mapes and Mrs. Mapes.

Q. Of course you mean the first part of April 1946?

A. Yes.

Mr. Platt: I think that is all, your Honor.

The Court: Anything you want to say in the nature of cross-examination, Mr. Cooke?

Mr. Cooke: Well, I wanted to say—I was afraid Mr. Platt would say that it is not responsive, but I want to say in respect to this ten thousand dollar deposit, if that question had been brought up in my mind I would figure that was an affair between Charles Mapes, Jr., and Mr. Denson, with which I hadn't anything to do.

Mr. Platt: Of course, if I may be permitted to ask you another question, Mr. Cooke?

Mr. Cooke: Yes.

Q. That is why I have been a little astonished

(Testimony of Mr. H. R. Cooke.)

that the failure of Mr. Mapes to put up the ten thousand dollars was set up by you as an affirmative defense in this case.

A. Maybe I can relieve your astonishment by saying that my theory of it was that was a joint obligation between those two people; so far as Mrs. Mapes was concerned, it didn't matter [744] from where it came. She had a claim against the two, whether 70 per cent by one and 30 per cent by the other, or equal, absolutely makes no difference. Mr. Denson was under legal obligation. If he wanted to enforce Mr. Mapes to put up one-half, he didn't have to look to Mrs. Mapes, he had to look to his co-partner for redress against him. That was the view I took of it and the view I have of it now.

Mr. Platt: Well, I was about to ask you a question concerning your construction of the contract, but I think that is a matter of law and opinion, your Honor. That is all.

Mr. Cooke: You ought to know what my opinion is.

Mr. Platt: Now, if the Court please, we have quite a number of depositions which we would like to offer in evidence. If the Court please, we offer in evidence the deposition of Mr. Leon Huckins, a witness on behalf of the plaintiff.

Mr. Cooke: We have some objections, your Honor, but I think they will go to specific questions taken pursuant to stipulation. [745]

DEPOSITION OF LEON HUCKINS

Direct Examination

1. Q. Please state your full name, present address and occupation or profession.
 - A. Leon Wood Huckins, Dallas, Texas, 4726 Coles Manor Place; retired from business.
2. Q. Have you ever been engaged in the hotel business, and if so, in what capacity. Please answer fully.
 - A. Yes. The four Huckins brothers have been in the hotel business all their lives and at one time owned or operated twelve hotels. Personally, I have managed the following hotels: Huckins Hotel, Sedalia, Missouri; Caddo Hotel, Shreveport, Louisiana; Huckins Hotel, Oklahoma City, Oklahoma; Westbrook Hotel, Fort Worth, Texas; Sir Francis Drake Hotel, San Francisco, California. I might add I purchased the property at the corner of Sutter and Powell streets in San Francisco in 1927, selected the architect and let building contract with Lindgren and Swinerton, who built the Sir Francis Drake, costing between 3 and 4 million dollars. The above hotel was financed without any expense to the corporation. In other words, we had 100 cent dollars for construction. I managed the Sir Francis Drake from 1928 to 1938, 10 years, and in 1938 the Huckins interest sold out to the Hilton Hotel Co.

(Deposition of Leon Huckins.)

3. Q. Are you acquainted with the plaintiff in the action, P. G. Denson, and if so, how long have you known him?

A. Yes, I am acquainted with Mr. P. G. Denson; have known him [746] for about 18 years.

4. Q. State whether you visited in company with the plaintiff, P. G. Denson, Mrs. Irene Gladys Mapes of Reno, Nevada, one of the above-named defendants, and if so, when, where and upon how many occasions?

A. Yes, in 1940 with Mr. Denson I made six or eight trips to Reno and discussed with Mrs. Mapes the building of a hotel on the old Post Office site. Mr. Denson and I suggested plans for all floors and it is rather singular that our plans are practically the same as the present plans—that is, we located stores on the two streets, lobby in rear of stores and coffee shop adjacent to lobby near river. We suggested having some apartments in addition to hotel rooms and the top floor for catering, gaming, etc. We secured the services of Douglas Stone, a prominent San Francisco architect. Mr. Stone drew several floor plans and exterior elevations and we made two or more trips to Reno with Mr. Stone to discuss plans, etc., with Mrs. Mapes. We also discussed with Mrs. Mapes the financing of the hotel. It was understood Denson and Huckins

(Deposition of Leon Huckins.)

were to lease the entire building with the exception of the stores, also we were to furnish the hotel and give chattel mortgage on furniture to secure our lease. Mrs. Mapes made one or two trips to San Francisco to discuss project with us. We were financially able to furnish hotel unincumbered and we also spent considerable time and money on the Reno project; all this in the year 1940. The hotel was to be leased to Denson and Huckins, each owning 50% of corporation.

5. Q. Please state who were——

Mr. Cooke: (Interrupting) Just a moment, Mr. Platt, until I interpose a motion to strike. The defendants move to strike all of the answer, directing your Honor to interrogatory No. 4, commencing with the words: "Mr. Denson and I suggested plans for all floors and it is rather singular that our plans are practically the same as the present plans * * *" down to the conclusion of the answer given by the witness, which includes the statement that he was financially able to finance the hotel unincumbered and so on, as to not being responsive to the question. The question was: "State whether you visited in company with the plaintiff, P. G. Denson, Mrs. Irene Gladys Mapes of Reno, Nevada, one of the above-named defendants, and if so, when, where and upon how many occasions?" Our position is that that answer is entirely unresponsive, that the

(Deposition of Leon Huckins.)

question calls for a statement as to when, where, and on how many occasions he visited with Mrs. Mapes and in addition to answering about 6 or 8 visits, he goes on, tell about a matter here that has nothing whatever to do with the question and is totally unresponsive.

The Court: Were the defendants represented at the taking of that deposition? [748]

Mr. Cooke: On that deposition no; by interrogatories by stipulation. They sent direct interrogatories to us and we then sent cross-interrogatories.

The Court: The thought occurred to me, there are so many things that appear in taking of depositions. For instance, attorney examining a witness on taking deposition might reason an answer to a question that might not be responsive and still no objection will be made at the time would not, of course, ask any other question to bring out the same matter the first question was on. I don't know whether that situation arises here or not.

Mr. Sinai: The stipulation provided that plaintiff give defendants 26 days' notice of taking of any deposition and in each instance a notice was properly given to the other side, so that they could have a representative present at the time of taking of the depositions. In fact, aside from the letter notice I talked to Mr. Cooke on one occasion and told him of the taking of the deposition on a certain date.

The Court: I can see where the testimony of the witness might not be, or the presentation of his

(Deposition of Leon Huckins.)

testimony, might be, curtailed by such a situation as we have here. An attorney sitting and hearing an answer, portions or all of which may not be responsive, would be lulled into a sort of [749] feeling that he had this matter that he wanted to have brought out and would have been brought out by subsequent question had somebody been present and made an objection. That is just the thought that occurred to me.

Mr. Cooke: The stipulation, your Honor, is the regular stereotyped stipulation.

The Court: At the time this was taken, was the plaintiff represented?

Mr. Platt: No, I think it was taken before a notary public.

Mr. Cooke: We were not present and I do not think the plaintiffs had any lawyer present. The point I am trying to make further, your Honor, if any of us had been present, we would have had the right to change or add to the questions, but the stipulation identified the interrogatories direct and crossed that might be asked and none other could be asked at the hearing of the taking of the deposition unless both parties acquiesced.

The Court: Please read the question and answer again, Mr. Cooke.

Mr. Cooke: The question is: "State whether you visited in company with the plaintiff, P. G. Denson, Mrs. Irene Gladys Mapes of Reno, Nevada, one of the above-named defendants, and if so, when, where

(Deposition of Leon Huckins.)

and upon how many occasions?" [750] That is the question. The first part of the answer, which is not objected to, is, he says: "Yes, in 1940 with Mr. Denson I made six or eight trips to Reno and discussed with Mrs. Mapes the building of a hotel on the old Post Office site." That, of course, is strictly responsive, but he goes on in considerable detail here.

The Court: I think it will go out from that point.

Mr. Platt: Your Honor please, just a moment, I would like to suggest I think it is a little unfair to the Court to put up an objection like this in the face of the conditions that your Honor has stated. What I am quite willing to do is to agree with counsel now that these depositions be read and if your Honor finds anything in them that is immaterial or improper or not responsive to a question and you desire to disregard it, it is all right with me, after all we are trying this case before the Court and I have the utmost confidence in your Honor's discrimination and judgment. I am ready and willing to enter into such an understanding with Mr. Cooke concerning all these depositions.

Mr. Cooke: I do not doubt that counsel would be, but I would state right here that we have a lot of objections to these depositions here besides the one of unresponsiveness and as to the stipulation, I realize that your Honor will separate the wheat from the chaff when we come to final decision of the

(Deposition of Leon Huckins.)

matter and I am not greatly concerned about a case tried before any judge that the question of admissibility, etc., is material, but I have had some painful experiences, and I suppose you have, that when you get into a higher court and something wrong occurs and it shows it occurred before the court and you don't object in the court below, you are bound by it. That is an unsatisfactory position for counsel to be in when he gets up in the upper court if the case should ultimately land there. I want to save the record. If this was a court of final appeal, no further, I would be disposed to agree with counsel's stipulation, but that is not the case. I want to stand squarely on the terms of the stipulation.

The Court: I think it will have to be considered that that part of the answer is not responsive.

Mr. Platt: Yes, your Honor, it is volunteered.

The Court: Just state for the record to show what portion is stricken.

Mr. Cooke: Yes, I tried to identify it as that portion of the answer following the words: " * * * and discussed with Mrs. Mapes the building of a hotel on the old Post Office site," and begins with the sentence, "Mr. Denson and I suggested plans for all floors and it is rather singular that our plans are practically the same as the present plans * * *"

Mr. Platt: (Interrupting) Well, just as we go along—"Mr. Denson and I suggested plans * * *" I think that is a part of the conversation. Now

(Deposition of Leon Huckins.)

his comment about that I [752] think would have to go out.

The Court: Was he asked for conversation? He was asked merely how many times, what was the occasion.

Mr. Cooke: “* * * when, where and upon how many occasions.” “State whether you visited in company with the plaintiff, P. G. Denson, Mrs. Irene Gladys Mapes of Reno, Nevada, one of the above-named defendants, and if so, when, where and upon how many occasions?”

The Court: There is no conversation called for.

Mr. Cooke: That will take in, as I view it, the balance of the answer going down to where he said: “We were financially able to furnish hotel unencumbered and we also spent considerable time and money on the Reno project; all this was in the year 1940—the hotel was to be leased to Denson and Huckins, each owning 50% of corporation.” That is the conclusion of it.

Mr. Platt: Your Honor, question No. 5. (Continuing with deposition).

Q. Please state who were present at these visits or interviews, and what as nearly as you recall, with as much detail as possible, was said by any and all of them.

The Court: Was there an answer to that?

Mr. Platt: Then he said:

Q. Most of question has been answered in question 4. [753]

(Deposition of Leon Huckins.)

The Court: Then we will let answer 4 stand as his answer to that question, so it puts it right back in again.

Mr. Platt: That is right.

The Court: Let that clearly appear in the record that that stricken portion of the previous answer stands and is to be considered as a portion of the answer to interrogatory No. 5. So it is in and out.

(Continuing with deposition.)

A. Most of question has been answered in question 4. Mrs. Mapes, Mr. Denson and I, were present at all meetings, and Mr. Stone was present at two or three conferences.

Mrs. Mapes seemed quite anxious to lease hotel to us, but was not satisfied with Mr. Stone's plans—yet, her present architect is using practically the same layout of stores, public rooms, bedrooms, apartments and sky room, etc.

Mr. Cooke: We move to strike that portion of the answer to direct interrogatory No. 5 herewith as follows: "Mrs. Mapes seemed quite anxious to lease hotel to us but was not satisfied with Mr. Stone's plans—yet, her present architect is using practically the same layout of stores, public rooms, bedrooms, apartments and sky room, etc.," on the ground it is not responsive to the question, which was: "Please state who were present at these visits or interviews, and what [754] as nearly as you recall, with as much detail as possible, was said by any and all of them."

(Deposition of Leon Huckins.)

The Court: I think that motion is good as to that portion of it beginning with the word "yet." I think the other portion of it was perhaps his version of what took place in the way of conversation.

Mr. Platt: We have no objection to that part being stricken.

The Court: The motion will be granted in part, to the effect that that part beginning with the word "yet" to conclusion of the answer be stricken.

Mr. Cooke: We except to the ruling allowing in: "Mrs. Mapes seemed quite anxious to lease hotel to us, but was not satisfied with Mr. Stone's plans * * *".

The Court: I am just trying to explain my thought on the thing. He is asked to narrate a conversation and as a lay witness is inclined to do, does not clearly understand the distinction between conclusion and statement of fact and he says she seemed to be in favor of or against this and that. Isn't that, their intention and purpose, the same as saying she expressed desirability or the effect of the conversation? [755]

Mr. Cooke: That is the witness's conclusion.

The Court: The motion will stand as heretofore disposed, granted in part, and you will have an exception to the ruling.

(Continuing with deposition.)

6. Q. Are you acquainted with the reputation of the plaintiff, P. G. Denson, as to his integrity and his capabilities as a hotel man

(Deposition of Leon Huckins.)

and manager, and with his financial responsibilities?

Mr. Cooke: I wish to object to the evidence sought to be elicited by that question upon the ground that it is not a matter to be established by reputation and that it is not in issue in this case as to whether Mr. Denson is a capable hotel man or wasn't. No attack has been made upon Mr. Denson as a hotel man.

The Court: Objection will be overruled.

(Continuing with deposition.)

A. In regard to Mr. Denson's reputation as a hotel man, will say that he is far above the average—very efficient and a practical business man, also knows how to meet the public, a good mixer with his guests and makes friends. Has the ability of selecting capable men for his assistants, pays top salaries and always has an excellent chef and serves the very best of foods.

Mr. Cooke: I wish to add to my objection now that [756] the evidence sought to be elicited is incompetent and immaterial, that it does not go to his general reputation, simply what the witness considers to be his reputation. Your Honor will note that the question was: "Are you acquainted with the reputation of the plaintiff, P. G. Denson, as to his integrity and capabilities as a hotel man and manager and with his financial responsibilities?"

(Deposition of Leon Huckins.)

In addition to the objection that it calls for a matter that is not susceptible to being established by reputation, either general or otherwise, we add the special and specific objection that the witness is not not qualified to testify in regard to Mr. Denson's reputation because he has not said that he knows what his general reputation is in the locality or community where he had operated or where he resides. I think that that is rather serious, your Honor, in this, that in all of these cases of reputation, where it is permitted at all, both in civil and criminal law, it is the general reputation and not what a witness might think his reputation is. In answer to the question what his reputation is, he might think almost anything constitutes reputation, but if he is asked to state if he knows what the general reputation is, then that presents quite a different figure. Our Supreme Court has held in one case that the question must embrace that qualification of general reputation and to simply ask if the witness knows his reputation is not sufficient to elicit any testimony, no proper foundation to [757] elicit any testimony as to what his reputation is. The whole subject of reputation is part of the case and can't be brought in under question that simply calls for reputation, as counter-distinguished from general reputation.

The Court: What are some of the preliminary questions in regard to the extent of this witness's acquaintance with Mr. Denson?

(Deposition of Leon Huckins.)

Mr. Platt: We have called this witness, your Honor, as an expert hotel man. He is giving his opinion as an expert. Your Honor will recall the preliminary questions brought forth answers from the witness that he owned and operated many many hotels and those hotels were all set out in his answer and named, the last one being the Sir Francis Drake in San Francisco, and we have qualified him, we think, as an expert hotel man.

The Court: That is true, but what did he say in his deposition as to the extent of his acquaintance with Mr. Denson?

Mr. Platt: Has know him for 18 years. Question 3. "Are you acquainted with the plaintiff in the action, P. G. Denson, and if so, how long have you known him? A. Yes, I am acquainted with Mr. P. G. Denson; have known him for about 18 years." Now your Honor will recall probably that we allege in our complaint, our amended complaint, that Mr. Denson is able, qualified, willing and has been at all times, to conform [758] with this contract. Now they deny these allegations and we must show his ability and his qualifications in the face of that denial and we are trying to show them.

The Court: Now let me get the question and answer that is objected to here again please.

Mr. Platt: This is question No. 6:

Q. Are you acquainted with the reputation of the plaintiff, P. G. Denson, as to his integrity and his capabilities as a hotel man and manager, and with his financial responsibilities?

(Deposition of Leon Huckins.)

A. In regard to Mr. Denson's reputation as a hotel man, will say that he is far above the average—very efficient and a practical business man, also knows how to meet the public, a good mixer with his guests and makes friends. Has the ability of selecting capable men for his assistants, pays top salaries and always has an excellent chef and serves the very best of foods.

Mr. Platt: I have, of course, not read all the answer yet. Counsel objected.

The Court: I want to ask Mr. Cooke a question there. Suppose that question was in this respect: "Have you an opinion as to Mr. Denson's integrity and ability as a hotel man?" Would that be objectionable?

Mr. Cooke: It would, your Honor, in my view. Question of opinion is not legal evidence. [759]

The Court: As an expert in the hotel business. I will overrule the objection. The answer may stand.

Mr. Platt: Continuing with the answer:

Regarding his character—Mr. Denson has a very lovable disposition and is a man of fine character—prince of a fellow; born in Georgia, is a real Southerner, and I venture to say has more sincere friends than any other hotel man in California.

Mr. Denson's reputation is A-1 and as to his integrity, his word is as good as his bond.

His financial condition in 1940 was more than ample to furnish the hotel and now, in 1946, I know

(Deposition of Leon Huckins.)

he is financially able to carry out all obligations in regard to his contract with Mrs. Mapes; in fact, he can furnish the entire hotel and in my judgment Reno is lucky in securing a man like Mr. Denson. Mr. Denson is capable and should have complete charge of all management; in other words, he is an excellent and efficient operator and if it could be arranged it would simplify matters to have only one manager.

Mr. Cooke: We move to strike all of the answer that was objected to for the reasons stated in the objection, and on the further ground that the question of Mr. Denson's capabilities is not raised by the pleadings in the case, his reputation or his standing is not attacked in any way by the [760] pleadings, therefore it would be irrelevant and immaterial. That there is no proper foundation laid. That the testimony of the witness goes far outside of the question of reputation, either general or otherwise, in that he is offering advice to the Court as to who should be the manager of the business, etc.

The Court: Motion denied.

(Continuing with deposition.)

7. Q. If your answer to the last question be in the affirmative, please state what his reputation in this respect is and upon what do you base it. Please answer with as much detail as possible.

A. Question No. 7 has been fully answered in my answer to question No. 6—as stated

(Deposition of Leon Huckins.)

above, I have known Mr. Denson for 18 years—so feel that I am qualified to state the above facts.

Mr. Cooke: I move to strike the answer on all the grounds heretofore stated and on the further ground that that shows that he is basing his testimony on his own personal knowledge and personal relations with Mr. Denson and not talking about reputation at all.

The Court: Objection overruled and motion denied.

Mr. Platt: Signed Leon Huckins. Subscribed and sworn to. I suppose, your Honor, that it might be marked properly as an exhibit.

The Court: Is it necessary to offer it in evidence?

Mr. Platt: I always do it. [761]

The Court: Well, it will be considered in evidence and marked as exhibit next in order, "R."

Mr. Platt: We next offer the deposition of Miss Ruth Mason, witness on behalf of the plaintiff:

DEPOSITION OF RUTH MASON

Questions and answers Nos. 1 to 6, inclusive, read without objection.

7. Q. Please state with as much detail as possible, as nearly as you recall, what was said and done by you, and each and all of the parties present at that meeting.

(Deposition of Ruth Mason.)

Mr. Cooke: That is objected to the evidence sought to be elicited by direct interrogatory No. 7 on the ground it is irrelevant and immaterial, has no bearing on the question of construction of the contract as of September 24, 1945; that it would tend to vary the terms of a written document.

The Court: Objection will be overruled.

(Continuing with deposition.)

A. At Mr. Denson's request, seconded by Mr. Mapes, I showed and explained by drawings and plans for the new hotel, working from the ground floor throughout to the room floors, and then to the sky room, or roof. There was much discussion and interest displayed, several modifications suggested on the original plans, some omissions and changes in the kitchen layout. The conference took about three hours. At about 12:15 or so, Mr. Mapes asked us all to luncheon with him "to continue [762] the conference later." We all, except Mr. Slocum, who had an appointment out of town, went to lunch together and returned about 1:40 or so. Then Mr. Mapes and Mr. Moorehead said they wouldn't go on with the discussion of the roof, or sky room, as "they had other plans and would go into those with Mr. Denson." However, Mr. Mapes expressed his appreciation of the drawings, and kept a copy of the coffee

(Deposition of Ruth Mason.)

shop and kitchen layout. Mr. Mapes then drove Mr. Hart, Mr. Denson and me back to the Sir Francis Drake Hotel in San Francisco, and took the package of plans and drawings up to my room for me.

8. Q. When did the meeting convene and when did it adjourn?

A. Convened approximately 9:30 and adjourned approximately 12:15. Then reconvened at approximately 1:40 and adjourned within about ten minutes.

9. Q. State whether there was any further discussion after the adjournment of the meeting with any of the parties present and within the hearing of Charles W. Mapes, Jr., one of the defendants herein, and if so, where did the discussion take place, and to the best of your recollection what was said with respect to the business matters involved.

Mr. Cooke: The defendants object to the evidence sought to be solicited by direct interrogatory No. 9, on the ground that it is irrelevant and immaterial upon any issue in this case, hasn't any tendency to establish whether this contract is one that your Honor can decree specific performance [763] of; that its sole tendency would be to vary the terms of the written agreement by conversation and talk had on things of which the witness is asked to testify.

(Deposition of Ruth Mason.)

The Court: What is the date?

Mr. Platt: April 1st.

The Court: Will you read that question again?

(Question read.)

The Court: Objection overruled. Answer the question.

Mr. Platt: The answer is?

A. See No. 7 herewith.

Mr. Platt: The previous answer. Signed Ruth R. Mason and sworn to.

The Court: That will be admitted in evidence as plaintiff's next in order, "S."

Mr. Platt: We next offer in evidence, if the Court please, the deposition of

DOUGLAS STONE

May we have a short recess, your Honor?

(Short recess.)

The Court: We were dealing with the deposition of the witness Stone.

Mr. Cooke: In regard to that, we ask to suppress because cross-interrogatories seem not to have been made a part of the deposition, although they were served upon counsel, but the interrogatory that we had is not of great importance, [764] and so far as the motion to suppress the deposition as a whole is concerned for failure of the cross-interrogatories being attached, we will not make that——

(Deposition of Douglas Stone.)

Mr. Platt: (Interrupting) May I interrupt? This is the cross-interrogatory.

Mr. Cooke: I thought your asociate said you didn't have it.

Mr. Platt: No, I told you to look and see if we did.

Mr. Cooke: I was going to add, however, that we have objections to specific interrogatories to take up as we go along.

The Court: Proceed.

Mr. Platt: We now submit and offer in evidence, if the Court please, the deposition of Douglas Stone.

Questions and answers Nos. 1 through 7, inclusive, read without objection.

8. Q. Please state whether or not you discussed the construction and operation of a hotel on the Mapes property, known as the old post office site on Virginia street, in Reno, Nevada, with Mrs. Mapes some time during February or March, 1940.

Mr. Cooke: We wish to interpose objection to the evidence sought to be elicited by direct interrogatory No. 8 on the ground it relates to some time during the months of February and March, 1940, some five years before the agreement [765] that is in controversy here was signed. That it would at most be in the nature of preliminary negotiations and conversations, discussions, had five years prior

(Deposition of Douglas Stone.)

to the making of the agreement, and is incompetent and irrelevant by reason of the principle of law that all of those things are deemed to have been merged into the written agreement. We object to it on the further ground if it had any fundamental effect in the case at all it would be in the nature of varying the terms of the written agreement, which can not, in any event, be varied by things prior to the making and could not in respect be varied by that. No foundation for any question for any question of mistake or fraud involved in the case.

The Court: There has been some testimony admitted of an early meeting in 1940, but I don't recollect that there was any great amount of testimony as to what took place at that meeting. It does strike me it is somewhat remote, Mr. Platt.

Mr. Platt: Well, one of the purposes of it, if the Court please, is to show the connection of Mr. Denson in early negotiations and arrangements, which eventually led into this contract and Mr. Denson testified about the early meeting in 1940 and Mrs. Mapes testified concerning it. And of course there is another very significant point, and that is that Mrs. Mapes from 1940, if we establish this date, up to and including [766] the 24th day of September, 1945, when she herself alone signed this agreement, had all of that period of time to investigate Mr. Denson, his qualifications, etc., and we are trying to show, through further evidence, that the meeting, or those meetings, in 1940 actually what

(Deposition of Douglas Stone.)

took place with reference to the construction of a hotel by her.

Mr. Cooke. If the Court please, there is an awful wide gulf between the contention, it seems, and the legal position of counsel in this case. We have insisted from the start that the only question to determine here is the question of whether the document of September 24, 1945, is one that a court of equity can decree specific performance of and that must be determined upon the face of the document. Your Honor has allowed evidence in with the idea of showing perhaps that there might have been a waiver by the parties as to the time element, but obviously, it seems to me, that even for that purpose evidence as to what transpired five years before there was any contract at all in writing, can not be admitted for any purpose showing waiver. In other words, if there is any waiver, arrangement made, that would tend to the dignity of a legal waiver, it would have to be after the contract was made. Otherwise, to go back five or forty years, it seems to me, and ask that this, that and the other may be admissible as determining the matter of waiver to an agreement that wasn't brought into existence until several years afterwards, that [767] would be objectionable. The question of Mr. Denson's qualifications—counsel feel that it would be important that we knew of his qualifications in 1940 or at least had ample time to investigate. There is no claim, no contention, I have insisted on that so

(Deposition of Douglas Stone.)

many times, that Mr. Denson is not a competent hotel man. I don't know anything about it, but it is not a question the Court has to do with. We signed up this agreement and if he is a competent hotel man, all right. If he is absolutely incompetent, it wouldn't be a defense with us because we signed. If we found out Mr. Denson was absolutely incompetent to run the hotel, we can't say that this man we signed up with on September 24, 1945, proved to be incompetent and therefore we do not feel we are bound by the agreement. That wouldn't be a measure. The court would throw that out without hesitancy. Whether he had 15 or 40 years' experience makes no difference and makes no difference whether we knew 15 years beforehand. There is no fraud or mistake pleaded. It is encumbering the record and getting off on the issues and injecting extraneous matters that would simply confuse, it seems to me. That is frankly the objection.

Mr. Platt: The thought in my mind, if your Honor will permit—when we go back to 1940, and I propose to argue this to your Honor on the merits—when we go back to 1940 and establish relations, the cordial relations, between Mrs. Mapes and Mr. Denson, together with tentative business suggestions [768] beginning way back in 1940, and then when we consider from the evidence that all of this thing was renewed in 1944 with Mr. Denson and then when we review the evidence, not only as to business arrangements leading up to the contract

(Deposition of Douglas Stone.)

and subsequent to it, but we go back clear to 1940 and show the social relations, the friendly relations, the implied confidence which Mrs. Mapes had in Mr. Denson, then we are leaning very heavily in support of our contention that because of this confidence and because of these social relations and because of the friendly relations there was a waiver of all these expressed time limitations. It all has a bearing upon it and I propose to argue that to your Honor as a matter of implication.

The Court: I will overrule the objection and admit the testimony. I mean admit the answer to the question.

(Continuing deposition.)

A. Yes.

9. Q. If your answer to the previous question is in the affirmative, please state who was with you at the time you discussed the matter of the construction and operation of a hotel on the property aforesaid.

Mr. Cooke: Same objection as interposed to direct interrogatory No. 8.

The Court: Objection overruled. [769]

(Continuing with deposition.)

- A. P. G. Denson, Plaintiff, Sid Barash, hotel broker, and Lee Huckins, hotel operator.
10. Q. If you have already testified that you had a conversation or conversations with Mrs. Mapes, please testify what that conversa-

(Deposition of Douglas Stone.)

tion or conversations were, to the best of your recollection.

Mr. Cooke: Same objection as interposed to direct interrogatory No. 8 of this same witness.

The Court: Same ruling.

(Continuing with deposition.)

A. The conversation was in effect that I might be employed as the architect for the construction of the hotel upon the cite above referred to and Mr. Barash might be interested in financing, Mr. Huckins and Mr. Denson might be interested in the operation of the hotel as tenants in accord with the lease to be agreed to.

11. Q. Please state what conversation or conversations you had with Mrs. Mapes relative to the construction and operation of said proposed hotel and the drawing of plans by you for said proposed hotel, giving the number of conversations and when and where they occurred, and the persons present.

Mr. Cooke: We have the same objection as to direct interrogatory No. 8 to the same witness to this interrogatory and further objection that it appears to relate not to the [770] connection of Mr. Denson, but rather some proposed tentative, vague or indefinite arrangement between Mrs. Mapes and the witness.

(Deposition of Douglas Stone.)

The Court: If that is true, I don't see where that would be material. Read that question again please.

(Question read.)

Mr. Platt: Of course, if Mr. Denson wasn't there, we admit the question isn't proper.

The Court: Let us hear the answer, subject to a motion to strike, and see what it is.

(Continuing with deposition.)

A. I had three meetings with Mrs. Mapes including the first one above referred to. The second meeting was approximately several months later. At that meeting Mrs. Mapes and I were present and I think Mr. Denson and Mr. Huckins. I had prepared preliminary plans and I explained the plans to those present. There was a third meeting which took place several months after the second meeting. Mrs. Mapes and I were the only ones present. I presented to her revisions of the previously submitted plans and these were discussed.

Mr. Platt: I do not desire to press that issue.

The Court: The objection will be sustained and the answer may be considered as out.

Mr. Platt: I do not think it is definite—— [771]

Mr. Cooke: (Interrupting) For the sake of the record, I move to strike it, your Honor.

The Court: Motion granted.

(Continuing with deposition.)

(Deposition of Douglas Stone.)

12. Q. Please state why you went to Reno at that time and at whose request.

Mr. Cooke: Same objection as to direct interrogatory No. 8.

The Court: Let us hear the answer, subject to motion to strike.

A. I went to Reno on the foregoing occasions in the possible anticipation of being employed as architect for the construction of the hotel at the request of Mr. Denson and Mr. Huckins.

Mr. Cooke: We add to the objection of the answer because it is hearsay as to Mrs. Mapes.

The Court: That answer may be stricken.

(Continuing with deposition.)

13. Q. Please state whether or not Mr. P. G. Denson had any conversation or conversations with Mrs. Mapes regarding the construction, operation and financing of said proposed hotel.

Mr. Cooke: We interpose the same objection there that we did to direct interrogatory No. 8 of this same witness, and the further objection that this would be hearsay. It is simply asking the broad general question as to whether Denson had any conversation with Mrs. Mapes regarding this without [772] stating whether it was in his presence or anything about it.

(Deposition of Douglas Stone.)

Mr. Pratt: If the answer doesn't show he is present, I won't object to the motion to strike.

The Court: We will hear the answer.

A. Yes. Mr. Denson on the first occasion, and possibly the second, if he were present in accord with my recollection, had conversations with Mrs. Mapes relative to leasing the hotel, construction thereof and financing of the project.

The Court: That would show on its face, wouldn't it, that Mr. Denson was present at a conversation or meeting between Mrs. Mapes and Mr. Denson. Motion denied.

Mr. Cooke: Our objection is that the question goes to the interrogatory. The answer can't cure the objection to the interrogatory.

(Continuing with deposition.)

14. Q. If your answer to the previous question is in the affirmative, please state what said conversation or conversations consisted of, when and where they took place, and who were present.

Mr. Cooke: Same objection as to direct interrogatory No. 8 of the same witness. Add the further objection that the answer of the witness does not show the conversation he is testifying about was had with Mrs. Mapes. He has the qualification in there "if Mrs. Mapes was present." [773]

(Deposition of Douglas Stone.)

The Court: I think you can tell better by reading the answer.

Mr. Cooke: I refer back to the last answer to question No. 13.

Mr. Platt: The witness is doubtful about the second meeting but he is not doubtful about the first meeting.

A. The conversations with Mrs. Mapes and Mr. Denson were on the first two occasions above referred to, assuming that Mr. Denson was there on the second occasion which is my best recollection, and they consisted of discussions concerning leasing, construction and financing the hotel and Mr. Denson's experience as a hotel man.

The Court: The objection is overruled and motion denied.

(Continuing with deposition.)

15. Q. If negotiations were carried on in respect to the construction, operation, and financing of said proposed hotel, please state the conversations relating thereto, or, if you can not remember the conversations, please state the substance of said conversations and particularly the conversations or substance of conversations relating to the possible leasing and operation of that hotel by P. G. Denson, if such was the case.

Mr. Cooke: We interpose the same objection as

(Deposition of Douglas Stone.)

made to direct interrogatory No. 8 to the same witness, and upon the [774] further ground that the element of time, place, and persons present is not stated in the interrogatory No. 15 nor does it call for conversation that was had with Mrs. Mapes or in her presence.

The Court: I will hear the answer, subject to motion to strike.

A. I can not remember the details of the conversations but the subject matter is set forth in my previous answers.

The Court: Motion denied. We will take our recess until 2:00 o'clock.

Friday, December 13, 1946.

Afternoon Session—2:00 p.m.

Deposition of Douglas Stone resumed.

Mr. Platt: If the Court please, resuming the reading of the interrogatories to Douglas Stone, question 16 of the direct interrogatory is as follows:

16 Q. If negotiations continued for the construction, operation, and financing of said proposed hotel, please state how long said negotiations continued and the reason for the termination of said negotiations, if you know.

Mr. Cooke: The defendants object to the direct interrogatory No. 16 upon the same ground and for

(Deposition of Douglas Stone.)

the same reasons as stated in objection to No. 8 interrogatory to the same witness. [775]

The Court: Same ruling.

(Continuing deposition.)

A. My knowledge of negotiations and discussions is confined to the three meetings above referred to, and these three meetings were within a period of about six months from the first meeting. The first and second meetings were about two hours each and the third was about one hour. I do not know anything about termination of negotiations or the reason therefor.

17. Q. Please state how many times you came to Reno to discuss said proposed hotel with Mrs. Mapes.

Mr. Cooke: Same objection, your Honor, as stated to interrogatory No. 8.

The Court: Same ruling.

A. Three times.

(Continuing deposition.)

18. Q. Please state whether or not you prepared any drawings, pictures, and plans for Mrs. Mapes and if so, state when they were delivered to Mrs. Mapes by you.

Mr. Cooke: Same objection, your Honor, as stated to interrogatory No. 8 above.

The Court: I don't just see what relevancy any plans prepared by this witness would have. Objection will be sustained.

(Deposition of Douglas Stone.)

19. Q. Please state to the best of your ability the conversation that took place with Mrs. Mapes at the time you submitted [776] said drawings, pictures, and plans to her, stating where they were submitted and who was present.

Mr. Cooke: That is the same place referred to in the interrogatory preceding that your Honor sustained the objection.

Mr. Platt: The answer to that is, your Honor;

A. I can only remember the subject matter of the conversation and not details. The subject matter is set forth in my previous answers.

The Court: Inasmuch as the previous answers had not been stricken or objections sustained to the question that led to this response, it may stand.

(Continuing deposition.)

20. Q. Please state whether or not the name of the proposed hotel was designated on said drawings prepared by you and, if so, what the name was.

Mr. Cooke: Same objection, your Honor, irrelevant and immaterial.

The Court: Same ruling. I sustain the objection to that.

(Continuing deposition.)

21. Q. Please state how long you have known Mr. P. G. Denson, the plaintiff in this case.

A. Twelve years.

(Deposition of Douglas Stone.)

22. Q. Have you ever had any business dealings with P. G. Denson in respect to hotels as it relates to your profession?

A. Mr. Denson and Mr. Huckins employed me to design a motel to be constructed in Sacramento, California.

23. Q. Please state your experience as an architect and designer of hotels.

Mr. Cooke: That is objected to on the ground that the evidence sought to be elicited by that interrogatory is irrelevant and immaterial. As to what experience Mr. Douglas Stone had as an architect can not, so far as we understand, have bearing upon the question here as to whether this is a contract that your Honor can decree specific performance on.

Mr. Platt: Your Honor, the purpose of that question is to lay foundation on the part of the witness as to his experience.

The Court: Objection will be overruled.

A. I have been an architect for over twenty years steadily engaged in that profession. During that period my employees gradually grew from none to the present number of about twenty-five. I have designed hotels, as set forth in my previous answers. I have likewise designed and supervised construction of medical-dental buildings, general commercial buildings, homes (to a lesser degree) hospitals (privately owned

(Deposition of Douglas Stone.)

and for the Government), and structures of every character.

24. Q. From your business dealings with Mr. P. G. Denson, please state whether or not, in your opinion, he is a man well [778] qualified to pass upon the fitness of hotel plans from the standpoint of a practical hotel operator.

Mr. Cooke: The defendants object to the evidence sought to be elicited by direct interrogatory No. 24 upon the ground that the same is immaterial and irrelevant; that there is no issue as to whether Mr. Denson is qualified to pass upon the hotel plans; that there is no basis in the record or any expert testimony or opinion evidence; that the question of his ability, whether it is in issue or not, can not be established by the opinion of somebody else. It is established by facts and not by what some individual may think about it.

The Court: Objection overruled. You may answer the question.

A. I consider Mr. Denson well qualified from his hotel experience of many years to pass upon the fitness of hotel plans from the standpoint of the operator. His experience well qualifies him for such.

25. Q. From your experience, resulting from your business dealings with Mr. P. G. Denson, state whether or not, in your opinion, the

(Deposition of Douglas Stone.)

advice of Mr. P. G. Denson to an architect and builder of a hotel is valuable.

Mr. Cooke: We interpose the objection there that it is irrelevant and immaterial, calling for an opinion of another man as to whether Mr. Denson is competent to give advice to an architect or builder of a hotel; that that question [779] is not in issue in this case; that no point was made as to his ability or lack of ability. It is simply a question as to whether a certain document, to-wit, the contract of September 24, 1945, is susceptible of specific performance and this does not bear upon that issue at all.

The Court: It seems to me the question does little more than to refresh your mind what was already said by Mr. Denson in a previous question, but the objection will be overruled.

A. I consider from my experience with Mr. Denson that his advice to an architect and builder of hotels would be highly valuable as a result of his many years of hotel operation.

26. Q. If your answer to the previous question is in the affirmative, please state the reason therefor.

Mr. Cooke: Objected to on the same ground as previously stated to interrogatory preceding. On the further ground that it is not a subject of expert testimony.

The Court: Well, it seems to me his opinion is sufficient without the reasons for it. The objection will be sustained. We have already heard from him in regard to his qualifications and the qualifications of Mr. Denson.

No objection to cross-interrogatory.

The Court: Deposition admitted as Plaintiff's Exhibit "T". [780]

Deposition of
GEORGE T. THOMPSON

No objections to direct interrogatories and answers Nos. 1 through 6 inclusive.

7. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

Mr. Cooke: Defendants object to the direct interrogatory No. 7 and the evidence sought to be elicited thereby of the witness, George T. Thompson, on the ground that the same is immaterial. On the further ground that the question of Denson's hotel experience is not in issue in this case and has not any bearing on the matter whether or not the contract should be specifically performed.

The Court: Objection overruled. The answer may be read.

(Deposition of George T. Thompson.)

A. I have known Mr. Denson as operator of hotels during the past 15 years and I am positive that all of these hotels were operated successfully and that he is considered a good hotel operator among the hotel fraternity.

Mr. Cooke: Defendants object to the answer to direct interrogatory No. 7 on the ground it is not responsive to the question. The question is: "Do you know of your own knowledge whether Mr. Denson has had any hotel experience * * *", and the answer is, "I have known Mr. Denson as operator of [781] hotels during the past 15 years and I am positive that all of these hotels were operated successfully and that he is considered a good hotel operator among the hotel fraternity." The ground of my objection and motion is that he was asked to state of his own knowledge and here he is stating how Mr. Denson is considered among the hotel fraternity. He was asked to state of his own knowledge what he knew.

The Court: The objection will be overruled. I think that was his way of answering that question yes.

(Continuing deposition.)

8. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

(Deposition of George T. Thompson.)

Mr. Cooke: That is objected to, if the Court please, on the ground that the matter of his reputation is irrelevant and immaterial, unless it embraces his general reputation; that if it is sought to qualify the witness to testify as to the subject of reputation in any way, it has to be in the form of a question calling for whether he knows the general reputation. Here it is simply the reputation, whatever the witness may consider constitutes reputation. The further objection is that the testimony sought to be elicited as to what his reputation is, whether general or otherwise, would be immaterial because it is not in issue in the case and hasn't anything to do with the question whether the contract should be specifically [782] enforced or not.

The Court: Wouldn't that question just mean this—assuming that this man is a hotel man, he has been connected with hotels for 25 years, the question is, "Do you know his reputation as a hotel man," addressed to a man the type of this witness, wouldn't that mean, "What is his general reputation among hotel people?" Wouldn't that mean that?

Mr. Cooke: No, I don't think so, I think the rule is very strict that more general areas in the country have invariably to be included.

The Court: The objection will be overruled.

A. Mr. Denson has been actively engaged in

(Deposition of George T. Thompson.)

the hotel business and also has been on the Board of Directors of the California State Hotel Association for a number of years. I consider him a man of ability and integrity and an efficient hotel operator.

Mr. Cooke: I move to strike the answer upon the ground it is not responsive. The question was as to whether he knew the reputation of Mr. Denson for ability, integrity and efficiency as a hotel man and operator and he had to qualify himself by stating yes or no, then go ahead and answer the question; if the answer was yes, then he could go ahead and state what that reputation is. [783]

The Court: If the witness was here on the stand, subject to another question here by counsel, I would sustain the objection. Under the circumstances, I will overrule the objection.

(Continuing deposition.)

9. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

A. Question 9 is answered by question 8.

Mr. Cooke: We object to the evidence sought to be elicited by that question upon the ground that he is not being asked as to his opinion. I mean he is not being asked as to what that reputation is, but he is asked if he knows what his reputation is, then he is asked what his opinion is. They are

(Deposition of George T. Thompson.)

asking for his own individual opinion. He has testified in a way about the reputation, now they are asking him here, if your answer to the question above as to his reputation is yes, then state what your opinion is. That evidence, of course, is irrelevant and immaterial, it is not responsive to the question. His individual opinion is of no fundamental value whatever. It is submitted by us that Mr. Denson's ability or lack of it is not a matter to be established by general reputation, but it certainly can't be established by the opinion of one man.

Mr. Platt: We are trying to establish it by the opinion of a lot of men.

Mr. Cooke: Well, we have just one here for the time being.

The Court: Objection will be overruled. It seems to me the other answer covers the whole situation.

(Continuing deposition.)

10. Q. Assuming that their is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent,

(Deposition of George T. Thompson.)

please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

Mr. Cooke: To that the defendants interpose an objection that what the custom and practices are on the Pacific Coast is not shown. On the further ground that the custom and practices on the Pacific Coast are not shown to be the same as those obtaining in Reno, Nevada. It is objected to on the [785] further ground that it involves an ultimate question in the case for the Court to decide and which can not be decided for the Court by either this witness or any other number of witnesses; that the question of what constitutes an equitable contract is peculiarly and exclusively one for a Court or a judge who is competent to determine, one that by reason of his education or training is competent, whereas the layman is not competent; that the question involves, as I stated a moment ago, one of the ultimate questions in the case. If this agreement is not fair and equitable to both parties, then that of itself, regardless of other questions, would constitute good and sufficient grounds for dismissal of plaintiff's suit, he has no cause for equity at all,

(Deposition of George T. Thompson.)

so it is incumbent upon the plaintiff to prove that the contract is fair and equitable to the parties, but I submit that that great big important question can no more be proved by so-called expert upon hotels generally with only a part of the picture before him, in answering the general question as to whether the contract is fair and the court accept that as evidence of facts of equity of the contract, than if we call a bunch of lawyers and ask whether this was a good Nevada contract. If your Honor can take expert testimony on one ultimate question, it would seem no reason why it can't be taken on the whole case. It is obvious to me, at least, that this objection must be absolutely good for that one reason, that the Court can not take testimony of people as to whether it is fair or not and then make finding that the contract is fair because John Smith and Tom Dick and Harry testified.

The Court: Objection overruled.

A. The guaranteed rental on the hotel now under construction known as the Mapes Hotel is higher than the going rate at the present time.

Mr. Cooke: I am not through with my objection, your Honor.

The Court: I thought you were. Pardon me sir.

Mr. Cooke: I submit also that the question isn't sufficient foundation on the facts to call for any expert opinion testimony, that an expert opinion

(Deposition of George T. Thompson.)

would in no event be admissible in that there is only a part of the contract presented to the witness upon which he is supposed to base his answer and that simply goes to the percentage income and to the minimum rental, but there is, as your Honor knows, considerably more to the contract than that, and before either this witness or your Honor or anybody else can undertake to show that the contract is fair and equitable they naturally want the entire document, not only want but have to have it. For your Honor to say any evidence that page 3 of the contract is fair and equitable, that being the only one referred to and shown, wouldn't get us anywhere in the final decision of the case because it is the whole contract that must be fair and [787] equitable and not only one page.

The Court: Objection is overruled and the answer may be read.

Mr. Platt: I think I did read it, your Honor.

(Answer read.)

Mr. Cooke: I move to strike the answer for all and singular the reasons stated in the objection.

The Court: Motion denied.

Cross-Interrogatories

Read down through (d) under question 2.

Mr. Cooke: The witness has not answered the question. I asked to have him break it down and state how much he collected for insurance, how much for taxes, and he makes a general answer

(Deposition of George T. Thompson.)

that it is answered above—\$20,000.00 a year covers the payments on upkeep, insurance and taxes,” those three things, but he does not state how much for upkeep, how much for insurance, and how much for taxes, and we ask that his testimony on direct given on the subject of qualifications, etc., be suppressed by reason of his failure and refusal to answer on cross-examination the questions that were asked him.

The Court: How long since that deposition was returned to the court?

Mr. Platt: The 26th.

The Court: Do you want to take a further deposition? I will allow you to do it. If you want to take [788] a further deposition of this gentleman to get those figures, you will be permitted to do so.

Mr. Cooke: That is our motion to your Honor.

The Court: Motion denied.

The Court: Who do you mean to further take his deposition?

The Court: If you are not satisfied with his answers given and did not have time to take further deposition after receipt of this deposition by the clerk of the court, the Court will grant time to take a further deposition if you so desire, but will deny your motion to suppress.

Mr. Cooke: Well, we submit the motion.

The Court: It is denied.

Mr. Cooke: All of these depositions came in, I think, within the last few days.

The Court: However, I will try to remedy that

(Deposition of George T. Thompson.)

situation by giving you all the time you might need to take further depositions.

Mr. Cooke: I would like the record to show what date this came in.

Mr. Sinai: December 2nd. Mailed from San Francisco November 30th and written on top "Lodged December 2, 1946."

(Mr. Cooke reads balance of cross-interrogatories without objection by plaintiff's counsel.) [789]

(Reads from deposition.)

3. Q. The attached statement mentioned in said direct interrogatory No. 10 provides that if the percentage of gross receipts shall not equal monthly \$2083.33 then the second parties (lessees) shall make up and pay to the first party the deficiency on any of the four classifications mentioned in said statement. In your answer to said direct interrogatory which of the two minimum rental provisions mentioned in said statement did you use in reaching your conclusion?

A. My understanding is that the amount of \$2083.33 per month was made up by the figures of \$600.00 from the coffee shop, kitchen and dining room, \$1,000.00 from the cocktail lounge, \$333.33 from the sky room and \$150.00 from the banquet room.

Mr. Cooke: I move to strike that answer on

(Deposition of George T. Thompson.)

the ground it is not responsive to the question. He was asked which of the two minimum rental provisions mentioned in said statement he used in reaching his conclusion and he says that he reached his conclusions on the percentage one only, not to the other one at the bottom of the page that is exhibited to him when he had this deposition prepared. That is the one where the minimum is determined by the amount for upkeep and insurance and borrowed money and the amortization. Your Honor will recall that there is a paragraph that in any event an amount sufficient to cover those items must be paid and the cross-examination or interrogatory was seeking to determine [790] from him whether he used that basis of finding the minimum or used the percentage basis which occurs in the preceding paragraph, and he does not answer.

The Court: From a reasonable construction of his answers could you determine which he used?

Mr. Platt: Well, he says himself he used only the preceding paragraph, and he does not answer. Honor. (Question 3 and answer read.) That is merely repeating the percentage classes. He made no reference whatever in regard to the question as to minimum determined by cost of insurance, upkeep, etc.

The Court: Wouldn't a fair answer be that it was the percentage plan instead of the other?

Mr. Cooke: I asked him to state which one.

The Court: It seems to me he has answer it by indicating how he arrived at it. Motion denied.

Deposition is admitted in evidence as Plaintiff's Exhibit "U."

Mr. Platt: We offer in evidence, if the Court please, the deposition of Harvey M. Toy.

Deposition of
HARVEY M. TOY

Direct Interrogatories

Interrogatories and answers Nos. 1 through No. 4 inclusive read without objection. [791]

5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

Mr. Cooke: To that question, direct interrogatory No. 5, the defendants object upon the ground that the evidence sought to be elicited by that question, to-wit, the matter of Mr. Denson's hotel experience, is irrelevant and immaterial; there is no question made in this case involving his experience or lack of it. On the further ground that the matter of his hotel experience is not in issue in any way and it is wholly unnecessary for the final determination of the case.

The Court: Objection overruled. The answer may be read.

Mr. Platt: Your Honor please, if your Honor

(Deposition of Harvey M. Toy.)

has any doubt this is an issue on the pleadings, I would be very anxious and willing—

The Court: (Interrupting) If you desire to make a statement, I would be glad to hear it.

Mr. Platt: Counsel continuously states this is not an issue in the case and I state to your Honor definitely that this is an issue in the case and it is so set out in the pleading. I think your Honor for permitting me to say something after you ruled.

(Question No. 5 read.) [792]

A. Yes. I have visited all the many hotel Peter G. Denson has built, owned and operated. I sold him the Johnson Hotel, in Visalia, California, which I know he sold to go into the Reno Hotel. He built and operated the Senator and Governor Hotels, in San Francisco. Also built and operated the Tioga Hotel, at Merced, California. He operated the Hotel Medford—Medford in Oregon, and the Hotel Travellers in Duns-muir, California. There are several more hotels he operated which I can not now remember. Therefore he is a builder, lessee, operator and owner of wide experience, all of his ventures were successful.

Mr. Cooke: Could I see that please. The defendants move to strike the following designed portion of the witness's answer to direct interrogatory No.

(Deposition of Harvey M. Toy.)

5, reading as follows: “* * * which I know he sold to go into the Reno Hotel.”

The Court: I think that may go out. That portion may go out.

Mr. Cooke: It is not responsive and is hearsay.

(Continuing deposition.)

6. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

Mr. Cooke: We make the objection to that, if your Honor please, that the question is incompetent and irrelevant; the evidence elicited thereby, if any, would be as to what the [793] witness considered the reputation as distinguished from general reputation. We object to it on the further ground that the matter of ability, integrity or efficiency as a hotel man and hotel operator embraced in that question is not a subject to be established legally by the evidence as reputation, either general or otherwise. It must be established by other and more direct evidence. That the matter of establishing things by general reputation is more or less invariably limited to the question of truth and veracity and does not include the same matter as to his ability, integrity and efficiency as a hotel man and hotel operator. That it is not any issue in the case here whether he is an able or efficient hotel operator or not and there is nothing in the

(Deposition of Harvey M. Toy.)

pleadings and nothing in the answer in the case that would make that circumstance of any fundamental value whatever.

The Court: Objection overruled. The question may be answered.

A. Yes. I consider Mr. Peter G. Denson one of California's best and most outstanding hotel managers and operators. He is strictly honest—extremely efficient and economical. He stands very high in the opinion of all California hotel men.

Mr. Cooke: I move to strike all of the answer after the word "Yes", on the ground it is not responsive to the question, which asks him if he knows the reputation of Mr. Denson as to his ability, integrity and efficiency as a hotel [794] man and hotel operator and he proceeds, after he says "Yes", he goes on and says what he considers.

The Court: I might be establishing a rule of evidence all my own here, but it seems to me when a man is on the witness stand and objection is made and answer it not responsive, there is an opportunity right then and there for counsel to be guided thereby and pursue the examination, but a deposition, where a man is asked if he knows the reputation of an individual and instead of saying yes or no or does say yes and goes on and answers it, why should we rule that out just because he wasn't asked some other question which obviously counsel would propound if the objection

(Deposition of Harvey M. Toy.)

was made in the presence of the witness. Objection will be overruled.

Mr. Cooke: That is a motion to strike, your Honor.

The Court: The motion to strike will be denied.

(Continuing deposition.)

7. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

Mr. Cooke: We object to that and the evidence sought to be elicited thereby, on the ground that the question is: "If your answer to the last question is in the affirmative * * *" [795] that is, if he knows what his reputation is, then "state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is." There is certainly a circumstance where the situation that your Honor had in mind can not be present. That is an interrogatory first asking a man what the reputation of some one else is and then asking what, in your opinion, is his ability, integrity and efficiency. The question does not ask for the witness' opinion at all. It asks for his reputation, his knowledge of the reputation of Mr. Denson, then it asks for his opinion, disregarding the question of reputation and altogether departing from that and asks what the witness, what his own individual opinion is, which he wasn't qualified on at all and

(Deposition of Harvey M. Toy.)

wasn't expressed in the situation. They were talking about reputation all the time.

The Court: What was this question?

(Question read.)

Mr. Platt: We have qualified him as an expert in hotel operations and we are asking his opinion as to qualifications of Mr. Denson. We are asking his opinion as an expert and if we don't get that kind of evidence and if it isn't material, your Honor, and proper, there is no other method that I know of by which we can establish the qualifications of a man to run and operate a hotel, except to get his own testimony and have him say, "I am the best qualified man in the world to [796] run a hotel."

Mr. Cooke: No, we don't do it that way at all. Let him tell how many hotels he has run, whether successful or a failure, how many times he went into bankruptcy, like that.

The Court: Objection overruled. You may answer.

- A. It is of the highest type. He has always been most successful and made money in all of his ventures. I would be willing to employ him at a splendid salary and percentage to operate my chain of hotels.
8. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expense of

(Deposition of Harvey M. Toy.)

approximately one million four hundred thousand dollars, and assuming that a contemplated lessee, or lessees, thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

Mr. Cooke: The question is objected to and the evidence sought to be elicited thereby is objected to on the ground it calls for an answer in accordance with the usual [797] custom and practices of hotel operations on the Pacific Coast. It is not shown that this witness knows anything about hotel operations in Nevada or any evidence from him there is any similarity whatever between the two. We object to it upon the further ground that whether the contract is fair, equitable or just is an ultimate question in this case reserved exclusively for the judge or the Court and can not be established by so-called expert witnesses giving their opinion as to what constitutes equitable or fair or

(Deposition of Harvey M. Toy.)

just. We object to it on the further ground that the witness is asked to form an opinion as to fairness and justness and equitableness of the contract upon one page of the contract, which contains only a portion of the obligations and the conditions of the contract and that therefore, there is no proper or legal basis for an expert to draw any conclusion as to whether the contract is fair or not.

The Court: Objection is overruled. The question may be answered.

- A. In answer to question 8, the lessor's return from the entire building, which includes the rentals from the number of stores, which I understand are eleven in all, will be more than sufficient to take care of all her obligations such as taxes, insurance, interest on borrowed money, and amortize the loan over a period of the 20 years, which I am informed the lease is for. Due to the fact that the rentals on the stores in the heart of Reno are very good and with five per cent for foods and ten per cent for beverages, and thirty per cent for all apartments and hotel rooms, gross rentals that is, to be paid to lessor by lessee, and with a hotel with approximately three hundred rooms and with the prevailing rentals in first class hotels, it will be more than sufficient to take care of

(Deposition of Harvey M. Toy.)

all the obligations that the lessor would have to meet. As to the fairness to the owner of the property who is leasing the hotel, the above percentages are more than just and adequate in the amount to pay for any hotel. In fact the prevailing rate is now 25 per cent for rooms, 5 per cent for food, and 8 per cent for beverages.

Mr. Cooke: The defendants move to strike the answer to direct interrogatory No. 8 of the witness, Harvey M. Toy, for all and singular the reasons stated in the objection to the question; on the further ground that he hasn't shown that he knows anything about the rental on stores in the heart of Reno, whether they are very good or not, as mentioned in his answer. It isn't shown that he knows anything about the conditions in Nevada in regard to the hotel business as compared with the hotel business in California.

The Court: Motion denied.

Cross-Interrogatories

Questions and answers Nos. 1 and 2 through subdivision (e) read without objection by plaintiff's counsel. [799]

Mr. Cooke: We move to suppress the direct interrogatories of the witness with reference to the fairness, the equity and reasonableness of the agreement, to which his attention is called, for his refusal and failure to answer cross interrogatory No. 2 by stating how much was allocated by him in

(Deposition of Harvey M. Toy.)

his computation for taxes and how much for upkeep and how much for insurance and covering it all in one item of 20 thousand dollars a year for all three of these, which is not what the question asked for.

The Court: The motion to suppress is denied, but counsel is given the privilege of taking a further deposition of the witness so that in the event of failure and refusal of the witness to answer any questions that may be propounded, proper proceedings may be had to compel answers of the witness.

Mr. Platt: It shows this is deposition of plaintiff's witness, not of defendants'. We are not under any obligation to cure defects of the plaintiff's.

The Court: That may not be shown from the record. That will be stricken from the record.

Mr. Cooke: That will be our contention, your Honor, whether in the record or not. We also move to suppress the answer to subdivision (e) of that same cross interrogatory, when we ask for amount that he allocates to cover interest on [800] borrowed money, his answer being: "Four per cent on borrowed money my understanding is they are trying to borrow \$650,000 or \$625,000, even \$800,000, \$72,000 would cover interest and amortization over twenty years." That is not an answer as to the interest nor is it an answer as to the amount allocated for amortization and the question on direct is on the assumption that there is \$1,400,000 cost of the building and no statement, so far as I recall, as to what amount was to be borrowed except as

(Deposition of Harvey M. Toy.)

stated in one page of the contract that is annexed to the question and made a part of the question, which states that second parties, as part of the lease, will guarantee to said first party the total annual income from the entire building which the first party will receive will be in amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period. We make that motion.

The Court: Motion to suppress denied and counsel is now given the privilege, if he desires any further answer, to the question, he may take further deposition of the witness. Deposition admitted in evidence as Plaintiff's Exhibit "V".

Mr. Cooke: May I state now for the record that we decline to take any further steps.

The Court: There is no order from the Court that [801] you take a deposition. That is for you to decide.

Mr. Cooke: I want your Honor to understand our position.

The Court: I know. I do not feel I should suppress an answer, particularly on matters of this kind, where an ordinary layman or hotel man might think he has sufficiently answered the question when in fact he didn't.

Mr. Platt: If the Court please, we now offer in evidence the deposition of Dan E. London.

Deposition of
DAN E. LONDON
Direct Interrogatories

Questions and answers Nos. 1 and 3 inclusive read without objection.

4. Q. Are you acquainted with Peter G. Denson, who resides at the Sir Francis Drake Hotel, San Francisco, California, and if so, how long have you known him?

A. I have known Peter G. Denson for a period of 14 years. Mr. Denson has had extensive hotel experience, having operated, since my acquaintance with him, the Medford Hotel, Medford, Oregon, from 1933 to 1935; the Travelers Hotel, Duns-muir, California, from 1930 to 1939, and the Johnson Hotel at Visalia, California, from 1937 to 1946. [802]

Mr. Cooke: The defendants move to strike all of the answer after the sentence, "I have known Peter G. Denson for a period of 14 years", which reads: "Mr. Denson has had extensive experience * * * to 1946," upon the ground that it is not responsive to the question. The question is simply are you acquainted with him and how long have you known him.

Mr. Platt: If the Court please, may I look at the rest of this deposition. I rather think probably the same question has been asked—no—I thought it might have been asked later but it hasn't. Now

(Deposition of Dan E. London.)

if Mr. Cooke's motion was sustained to strike the rest of answer No. 4, which probably is well taken because it is not responsive, yet the next question clears it all up.

The Court: That is the reason I will deny the motion. If the witness was here in court and immediately upon answering that first mentioned question as he did the motion to strike was made because it was not responsive, the motion would be granted and counsel would have an opportunity to further examine. The motion is denied.

(Continuing with deposition.)

5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much [803] detail as possible.

Mr. Cooke: We object to that on the ground that the question of his ability and experience as a hotel man is not in issue in this case. It is simply a matter here as to whether the legal status of a document as a contract can be specifically performed or not. It is immaterial to any question in the case.

The Court: Objection will be overruled.

(Continuing with deposition.)

A. His experience has been extensive, as he managed the Medford Hotel, Medford, Oregon, 1933 to 1936, Travelers Hotel,

(Deposition of Dan E. London.)

Dunsmuir, California, 1930 to 1939, Johnson Hotel, Visalia, California, 1937 to 1946.

- 6 Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

Mr. Cooke: That is objected to on the same ground as to same questions elsewhere propounded to other witnesses, in that it calls for reputation instead of general reputation. It is objected to on the further ground that the matter of his ability, integrity and efficiency is not a thing to be established by general reputation. On the further ground that the question of his ability or integrity or efficiency as a hotel man or hotel operator is not pleaded in the case, not in issue, no question made about it. It is immaterial to any [804] final disposition of this case.

The Court: Objection overruled.

(Continuing with deposition.)

A. I do know his reputation.

- 7 Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

Mr. Cooke: We make the same objection there as previously and upon the further ground no foun-

(Deposition of Dan E. London.)

dation laid for asking for general reputation instead of merely a reputation.

The Court: Same ruling. Objection will be overruled.

(Continuing with deposition.)

- A. Mr. Denson is considered an exceptionally capable hotel operator and to my knowledge has always conducted successful operations which have been well regarded by the traveling hotel public. In my opinion, his ability to manage a hotel efficiently is unquestioned.
8. Q. Assuming that there is being constructed in Reno, Nevada what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement [805] as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual cus-

(Deposition of Dan E. London.)

tom and practices of hotel operations on the Pacific Coast.

Mr. Cooke: I make the objection, if the Court please, to the interrogatory and evidence sought to be elicited on the ground that the property described here is not on the Pacific Coast and the usual custom and practices on the Pacific Coast would not necessarily apply. There is nothing to show that they are the same here as they are there. I mean the custom and practices are the same. We object on the further ground that there is a picture of the hotel being constructed at a cost of approximately one million four hundred thousand dollars and there is no basis for that in the evidence that I know of, that this is the cost. The actual cost is nearly two million dollars, the total venture, hence the figures given here, based upon some supposed cost of the building as representing the entire investment would be misleading, would have no basis to establishing of any value and is simply confusing. We object to it on the further ground that the question as to whether the lease is fair, equitable and just to the lessor, fair and just and adequate, amount to pay as rental and answer to that is sought to be had from the witness by showing him one page and have him base his answer on one [806] page of the contract consisting of some three or four pages. I do not know how many, but there is more than that one. Before this witness, or any witness, could give any answer to any value whatever as to whether it is fair or just and equitable, he would

(Deposition of Dan E. London.)

have the entire document. We make the further objection that they are only asking for one item, one special matter of the lease agreement or lease arrangement, namely the percentage rentals and the guaranteed minimum appearing on one page and that that is irrelevant and immaterial without being connected up and considered in connection with the entire lease or the entire document, and that essential facts are omitted in the hypothetical question, as I have already detailed in my objection.

The Court: Objection overruled. The question may be answered.

(Continuing with deposition.)

A. In my opinion, from an examination of the attached statement of lessors, return from the hotel building, including sub-rentals from a number of stores, will be more than sufficient to take care of all major obligations and quite enough to amortize the loan over a period of twenty years, for which period I understand the lease is drawn. The percentage figures, which, of course, are the most important from the view point of the owner, are very fair and are usual and comparable to percentage figures in other hotel leases. [807]

Mr. Cooke: We move to strike the answer of the witness, Dan E. London, to direct interrogatory No. 8, on the ground that his answer apparently on the

(Deposition of Dan E. London.)

face of it does not respond to the statements of fact in the hypothetical question, in that he has taken into consideration giving his answer as to the fairness and equity of the agreement subrentals, what he calls subrentals, from a number of stores and there is no way of knowing what he allocates to these subrentals and the matter of subrentals is not presented to him in the hypothetical question as to amount, or the subject at all.

The Court: Motion denied.

Cross-Interrogatories

Question 1 and answer read.

Mr. Platt: I suppose that means none, but it is "no."

Mr. Platt: I will admit that is what he means.

Reads questions and answers thru subdivision (e) of question No. 2 without objection.

Mr. Platt: We move to suppress that portion of the witness' deposition with reference to the agreement being just and fair and equitable on the ground he has neglected and failed to make proper answer to cross-interrogatory with reference to the manner in which he arrived at his answer given on direct, particularly with regard to the amount that he allocated or deemed necessary to cover upkeep and the [808] amount that he deemed was necessary to cover interest on borrowed money.

The Court: Motion will be denied and the defendants are given the privilege of further examining the witness on these subjects if they so desire.

(Deposition of Dan E. London.)

Mr. Cooke: There is a further subdivision.

(Continuing with deposition.)

(f) as the cost of the building and to amortize the cost of said building?

A. Entirely depending on the amount borrowed.

Mr. Platt: I would like to renew my motion to strike based on the failure and refusal of the witness to answer as to what amount he assumed in reaching his conclusion.

The Court: You may renew the motion and the same ruling and same understanding, that defendants may, if they so desire to, further examine the witness.

Balance of desposition read, without objection.

Mr. Cooke: We move to suppress all the testimony of the witness London with reference to the fairness and the equity of the alleged contract, on the ground that he failed and refused to answer the proper cross-interrogatory, namely cross-interrogatory No. 3.

The Court: Motion will be denied and defendants will be given the privilege of further examining [809] the witness if they so desire on the matter indicated in the motion. Deposition will be admitted as Plaintiff's Exhibit "W".

Mr. Platt: We now offer in evidence, if the Court please, the deposition of Will P. Taylor.

Deposition of
WILL P. TAYLOR

Direct Interrogatories

Questions and answers Nos. 1 through 5 read without objection.

6. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

Mr. Cooke. That is objected to on the ground it is irrelevant and immaterial. His character is not in issue as a hotel man or character of experience—entirely irrelevant to any issue in this case.

The Court: Objection overruled.

(Continuing with deposition.)

- A. Yes, I can certify that I have known of his ownership and operation of Hotel Medford, Medford, Oregon, Hotels Senator and Governor, San Francisco, Hotel Tioga, Merced, and Hotel Johnson. My recollection is that Mr. Denson in the majority of cases mentioned, built, opened and operated the above hotels.
7. Q. Do you know the reputation of Mr. Peter G. Denson, the [810] plaintiff in this action, for his ability, integrity and efficiency as a hotel man and hotel operator?

(Deposition of Will P. Taylor.)

Mr. Cooke: That is objected to and the evidence sought to be elicited as to what his reputation is, as irrelevant and immaterial; that if his reputation is important at all, it is a general reputation, which the witness would be required to state; that as to whether his reputation as a hotel man, efficient hotel man, or ability and integrity and character is good is entirely immaterial, so far as this case is concerned.

The Court: Objection overruled.

(Continuing with deposition.)

A. Yes, it is excellent.

Mr. Cooke: We move to strike out the last part; not responsive to the question—"it is excellent." That part I move to strike.

The Court: That all depends on whether or not some other question is involved here. I will withhold ruling on that until you read a little further.

(Continuing with deposition.)

8. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

The Court: The other motion will be granted. It may [811] go out, "it is excellent", as not responsive.

(Continuing with deposition.)

A. It is my opinion Mr. Denson's qualifica-

(Deposition of Will P. Taylor.)

tions, his ability, integrity and efficiency as an hotel operator are excellent, and he could be depended upon to achieve satisfactory results in every particular.

The Court: We will take a recess at this time for about 15 minutes.

(Short recess.)

Deposition of Will T. Taylor continued on direct interrogatories.

9. Q. Assuming that there is being constructed in Reno, Nevada what is known as the Mapes Hotel, at a cost and expense of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

Mr. Cooke: We make the same objection to that as [812] we made to question No. 8 of the London

(Deposition of Will P. Taylor.)

deposition direct interrogatory, without repeating at length.

The Court: It may be deemed to be so made and overruled.

(Continuing with deposition.)

A. Yes, I would consider it more than equitable.

Mr. Cooke: I move to strike the answer on the ground that it is simply conclusion of the witness as to what he considers equitable, based upon one page of the September 24, 1945 document and that he is only undertaking to testify as to the rentals, without taking into consideration other conditions of the contract, all of which must be considered in determining whether or not an agreement is fair and equitable and within the rules of specific performance.

The Court: Motion denied.

Cross-Interrogatories

Reads all cross-interrogatories and answers without objection from counsel for plaintiff.

Mr. Platt: The defendants move to suppress the entire testimony of the witness with reference to the adequacy or equity or fairness of the agreement that he is referring to, upon the grounds that he failed and refused to answer cross-interrogatories which were proper in view of his own testimony on direct, as to how he reached his conclusion, particularly

(Deposition of Will P. Taylor.)

[813] what he assumed was the total income from the entire building and what he assumed as to the amount necessary to cover payment required to be paid by the lessor for taxes, what he assumes necessary to cover upkeep and what for insurance, what he assumes necessary to cover interest on borrowed money, and what he assumes as the amount necessary for the cost of the building and to amortize such cost and what he assumes for the allocation to the premises to be leased for hotel purposes and what amount did he allocate to the 11 store spaces, and his neglect and refusal to answer cross interrogatory No. 3, where he was asked to state which one of the two minimum rental provisions mentioned in the paper that was presented to him, namely, the one based upon percentage and the other based upon amount necessary to take care of certain fixed charges, such as interest on borrowed money, upkeep, and so on.

The Court: The motion will be denied, with the privilege to the defendant to further interrogate this witness if so desired. I might add that in any of these statements where I stated that defendants had the privilege, if they so desired, to further interrogate the witness that sufficient time would be given if, at the conclusion of the case they indicate their desire to take advantage of that opportunity.

Mr. Cooke: May the record show that the envelope [814] containing the deposition of Will Taylor was received by the clerk and filed on December 2, 1946?

The Court: Yes sir, it may so show. Deposition admitted as Exhibit "X".

Mr. Platt: We now offer in evidence the deposition of S. P. Barash.

S. P. BARASH

Direct Interrogatories

Questions and answers of Nos. 1 through 4 read without objection.

5. Q. Please state whether or not you discussed the construction and operation of a hotel on the Mapes property known as the old postoffice site on Virginia Street, in Reno, Nevada, with Mrs. Mapes some time during February or March, 1940.

Mr. Cooke: Objected, if the court please, by the defendants on the ground that direct interrogatory No. 5 just read by counsel would, if answered, elicit testimony as to preliminary negotiations and preliminary proceedings had five years or thereabouts prior to the making of the document that is in question in this case and that it is foreclosed by the rule with regard to the document being deemed to conclusively represent what the parties agreed upon rather than what they talked about three or four years prior. [815]

The Court: If it is not disclosed by the deposition that Mr. Denson was present, I will sustain that objection.

(Deposition of S. P. Barash.)

Mr. Platt: It is shown in the next question, your Honor.

The Court: I will withhold ruling until we see what the next question is.

(Continuing with deposition.)

6. Q. If your answer to the previous question is in the affirmative, please state who was with you at the time you discussed the matter of the construction and operation of a hotel on the property aforesaid.

A. Mr. P. G. Denson, Mr. Douglas Stone and Mr. Leon Huckins.

The Court: Objection to the previous question will be overruled.

Mr. Platt: May I here state the answer as shown by the deposition?

The Court: Yes sir.

Mr. Platt: To question 5 the answer is yes.

(Continuing with deposition.)

7. Q. If you have already testified that you had a conversation or conversations with Mrs. Mapes, please testify what the conversation or conversations were, to the best of your recollection.

Mr. Cooke: We make the same objection as to the evidence [816] sought to be elicited by the question, your Honor. Pertains to preliminary discussions and talk with parties not parties to the con-

(Deposition of S. P. Barash.)

tract, but with the witness himself. That it is too remote in point of time to be of any value in determining conditions as they existed during the time the document was signed September 24th, 1945, or October 4, 1945.

The Court: Objection overruled.

(Continuing deposition.)

A. Mr. Denson had plans for a hotel to be erected on the old postoffice site and I was requested to advise all the parties concerned regarding the possibility of securing a mortgage loan on the new development as well as the terms of such a loan.

Mr. Cooke: We move to strike the portion of the answer which reads: "Mr. Denson had plans for a hotel to be erected on the old postoffice site", on the ground it is not responsive to the question, which is, "Please testify what the conversation or conversations were, to the best of your recollection."

The Court: What is the entire answer of that?

(Answer read.)

The Court: Motion is denied.

(Continuing deposition.)

8. Q. Please state why you went to Reno at that time and at whose request. [817]

Mr. Cooke: Objected to as irrelevant and immaterial; too remote for anything to do with the contract in question.

(Deposition of S. P. Barash.)

The Court: It does seem as if it is. Objection sustained.

(Continuing with deposition.)

9. Q. Please state whether or not Mr. P. G. Denson had any conversation or conversations with Mrs. Mapes regarding the construction, operation, and financing of said proposed hotel.

Mr. Cooke: We object to that as irrelevant and immaterial, in that it is subject to the same kind of objection in regard to preliminary negotiations heretofore made; that it is indefinite as to point of time as to what conversation or conversations he is asking about, that is, as to when they occurred, and it is objectionable also on the ground it calls for hearsay. He is asked to state whether or not Mr. Denson had any conversations with Mrs. Mapes. He might answer that question by saying yes and turn out that all he had was hearsay.

The Court: In regard to the point of time, I gather that it refers to this conversation previously identified at the time.

Mr. Platt: Yes, your Honor, at which all parties were present.

Mr. Cooke: It doesn't so show on the face of the question. [818]

The Court: The objection will be overruled.

Mr. Platt: The answer is yes.

(Continuing with deposition.)

(Deposition of S. P. Barash.)

10. Q. If your answer to the previous question is in the affirmative, please state what said conversation or conversations consisted of, when and where they took place, and who was present.

Mr. Cooke: Same objection as made to interrogatory No. 9, your Honor.

The Court: Objection overruled.

A. The meeting took place at Mrs. Mapes home. The parties present and the subject of the conversation is covered in 6 and 7.

Mr. Platt: In order to inform your Honor as to question 6, the question is: "Please state who was with you at the time you discussed the matter of the construction and operation of a hotel on the property aforesaid", and the answer is: "Mr. P. G. Denson, Mr. Douglas Stone and Mr. Leon Huckins." The witness refers to that question. And then he refers to question 7, which is: "If you have already testified that you had a conversation or conversations with Mrs. Mapes, please testify what the conversation or conversations were, to the best of your recollection", and he answered that. Those are the two questions he refers to in his answer to question No. 10.

(Continuing with deposition.) [819]

11. Q. If negotiations were carried on in respect to the construction, operation, and financing of said proposed hotel, please state the

(Deposition of S. P. Barash.)

conversations relating thereto, or, if you can not remember the conversations, please state the substance of said conversations and particularly the conversations or substance of conversations relating to the possible leasing and operation of that hotel by P. G. Denson, if such was the case.

Mr. Cooke: That is objected to, if the Court please, upon the ground it is irrelevant and immaterial under the rule relating to preliminary negotiations. It is too remote to have any bearing on the question of whether the plaintiff is entitled to specific performance of the agreement of September 24, 1945 and I repeat there the same objection made to the interrogatory next above.

The Court: Same ruling. Objection overruled.

(Continuing with deposition.)

- A. Mr. Denson proposed to lease the hotel on a percentage lease and the discussion was mostly about the size, number of rooms and estimated cost of the building.
12. Q. If negotiations continued for the construction, operation, and financing of said proposed hotel, please state how long said negotiations continued and the reason for the termination of said negotiations if you know.

Mr. Cooke: Same objection as to the next previous several questions. [820]

(Deposition of S. P. Barash.)

The Court: Same ruling.

A. This was the only meeting I attended.

13. Q. Please state how many times you came to Reno to discuss said proposed hotel with Mrs. Mapes and also state if you know how many times Mr. P. G. Denson called upon Mrs. Mapes and how many times Mr. Douglas Stone and Mr. L. W. Huckins called upon Mrs. Mapes in Reno, Nevada.

Mr. Cooke: Same objection, your Honor.

The Court: Same ruling.

Mr. Platt: The answer is:

A. I called only once. I have no way of knowing how many times the other parties went to Reno or met Mrs. Mapes.

14. Q. Please state of your own knowledge whether or not Douglas Stone, the architect, prepared any drawings, pictures, and plans for Mrs. Mapes some time about March, 1940.

Mr. Cooke: Same objection and the special objection that the plans drawn by Mr. Douglas Stone are not shown to have any connection with Mr. Denson or the subsequent contract or with the hotel that was finally built or under course of construction. Has absolutely nothing to do with the case.

The Court: The objection seems to be good. Sustained.

(Deposition of S. P. Barash.)

(Continuing with deposition.)

Questions 15 and 16 read. Same objection and same ruling. Objection sustained. [821]

Questions and answers No. 17 and 18 read without objection.

19. Q. Please state your opinion of P. G. Denson as a successful hotel operator and give the basis for your answer.

Mr. Cooke: That is objected to, if the Court please, upon the ground his opinion is not any legal evidence of the establishment of the fact we may know Mr. Denson is a successful hotel operator, and it is only general reputation that would be admissible in any event and this simply calls for individual opinion of one man.

The Court: Objection overruled. Answer the question.

A. Mr. Denson is a competent and capable hotel operator. He was successful in all his hotel operations.

20. Q. Do you consider the terms of a proposed lease as set out in Exhibit "A" attached to these direct interrogatories, just, fair, and equitable to the lessor and if so, state why.

Mr. Cooke. That is objected to, if your Honor please, upon the ground that there is no proper sufficient basis in the question to enable the witness

(Deposition of S. P. Barash.)

to reach any conclusion. On the further ground it calls for the witness' decision upon a matter that is for the ultimate decision of this Court, and it is objected to on the further ground that the essential facts are not assumed in the question in regard to the income of the building, that in any event the testimony is immaterial, irrelevant and inadmissible. [822]

The Court: Objection overruled.

Mr. Platt: For your Honor's information, I might say a copy of the entire lease is attached, Exhibit "A", in connection with this question.

(Continuing with deposition.)

A. Yes they are fair and are more generous than I would offer. I think 25% of room gross is ample and 3% of food gross is ample where tenant is supplying the equipment and furniture. The minimum guarantee as covered by clause "9" in the agreement is larger than I would personally agree to.

Questions and answers Nos. 21 and 22 read without objection.

23. Q. Please state your experience, if any, as the lessee of a hotel or hotels, giving the names of said hotel or hotels, if any, and the period of time you acted as lessee.

Mr. Cooke: Defendants interpose objection to direct interrogatory No. 23 upon the ground the

(Deposition of S. P. Barash.)

evidence sought to be elicited thereby is irrelevant and immaterial for the reasons stated in other objections previously stated.

The Court: Objection overruled.

A. Same as above.

Cross-Interrogatories

All questions and answers read without objection.

The Court: It may be admitted as Plaintiff's Exhibit "Y". [823]

Mr. Platt: We offer in evidence, your Honor, the deposition of

THOMAS E. HULL

Questions and answers Nos. 1 through 4 read without objection.

5. Q. Do you know of your own knowledge whether Mr. Denson has had any hotel experience, and if so, what is the nature and character of that experience? Please answer with as much detail as possible.

Mr. Cooke: That is objected to as irrelevant and immaterial, his experience. Not any issue in the case.

The Court: Objection overruled.

(Continuing with deposition:)

A. Owning and operating several hotels of prominence over the past 25 years.

6. Q. Do you know the reputation of Mr. Peter G. Denson, the plaintiff in this action, for

(Deposition of Thomas E. Hull.)

his ability, integrity and efficiency as a hotel man and hotel operator?

Mr. Cooke: That is objected to upon the ground that it is not a proper question or not a question that would elicit proper evidence as to reputation. It does not call for general reputation; that in any event the reputation of Mr. Denson is irrelevant and immaterial, not in issue in this case and it is not attacked, no occasion for him to put in any evidence as to his character until there is some attack.

The Court: What is that question again? [824]

(Question read.)

The Court: Objection overruled.

(Continuing with deposition:)

A. Excellent.

7. Q. If your answer to the last question is in the affirmative, please state what in your opinion his ability, integrity and efficiency as a hotel man and hotel operator is.

Mr. Cooke: I suppose to be consistent, I should ask your Honor to strike the answer to question 8 on the ground it is not responsive. He was asked if he knew the reputation and he said it is excellent.

Mr. Platt: You mean No. 6.

Mr. Cooke: Yes.

Mr. Platt: Instead of saying "Yes, I know," he said "Excellent."

(Deposition of Thomas E. Hull.)

Mr. Cooke: Yes, but he hasn't said he knew.

The Court: Objection will be overruled.

(Question 7 read again.)

Mr. Cooke: That is objected to upon the ground there is no question made to the witness as to his opinion; that his opinion, in any event, would be irrelevant and immaterial, it can't establish integrity, efficiency as a hotel man or hotel operator by the opinion of one man, the witness.

The Court: Objection overruled.

(Continuing with deposition:) [825]

- A. By the financial success he has achieved and by the reputation for his ability that he has in the hotel fraternity and with people such as bankers, attorneys, who have had connections and knowledge of his operations over the past 25 years.
8. Q. Assuming that there is being constructed in Reno, Nevada, what is known as the Mapes Hotel, at a cost and expenses of approximately one million four hundred thousand dollars, and assuming that a contemplated lessee or lessees thereof are to adequately and suitably furnish the same and pay the costs and expenses therefor and give a chattel mortgage thereon as a guarantee for the payment of the rent, please state whether in your opinion the attached statement and agreement as to the

(Deposition of Thomas E. Hull.)

rental price and consideration for said lease is fair, equitable and just to the lessor, and is a fair, just and adequate amount to pay as rental for said hotel premises in accordance with the usual custom and practices of hotel operations on the Pacific Coast.

Mr. Cooke: That is objected to upon the ground that it does not contain a sufficient basis or assumption of the facts; that there is only one page of the 5-page document of September 24th annexed for the witness's examination; that his opinion as to that one page would be fair or unfair would be of no aid to the Court in determining whether the agreement as a whole is fair and equitable. That in order to qualify the [826] witness and lay the proper foundation in a hypothetical question, the entire agreement should be referred to him, so that he could answer the question upon the entire agreement and not upon only one page. We object on the further ground that he is asked to state whether it is in accordance with the usual custom and practices of hotel operations on the Pacific Coast, which are not shown to be in effect or to be applicable to conditions in Reno. We object on the further ground that it is a question to be ultimately determined by the Court and it is not for any witness to usurp the province of the Court. The question of whether the agreement is equitable and fair is one peculiarly for the Court to determine and not for a layman.

(Deposition of Thomas E. Hull.)

The Court: Objection overruled.

(Continuing with deposition:)

- A. I personally originated the first percentage lease on a hotel property in California, the same being at the Mayfair Hotel, Los Angeles, California. This lease was automatic in percentages, as per the terms as recited in the following brief.

The Mayfair lease by 15 years' experience has proven successful and fair to all parties concerned, and has been used by hotel accounting houses as a yardstick and considered workable, practical and a fair basis of computing the terms of rental percentage basis. I personally think the terms of rental as recited in the brief is extremely fair to the lessor. The percentages as outlined under the terms of rental in the [827] lease brief attached can be applied to the gross receipts as estimated herewith, thereby leaving net returns to the lessor of sufficient amount to amortize the invested capital over a 20-year period, plus taxes, insurance and interest on borrowed capital, etc.

Mr. Cooke: We move to strike the portion of the answer to direct interrogatory No. 8, reading, "I personally originated the first percentage lease on a hotel property in California * * * and con-

(Deposition of Thomas E. Hull.)

sidered workable, practical and a fair basis of computing the terms of rental percentage basis." That portion I have read, I move to strike.

The Court: I will regard that as sort of foundation for his opinion to show the method by which he arrives at his answer. The motion will be denied.

Mr. Cooke: I have not finished it, your Honor. I would like to finish my motion.

The Court: Oh, pardon me, I thought you were through.

Mr. Cooke: Upon the ground that it is not responsive to the question, which was: State whether or not this particular document—this page 1 out of the 5 pages of the September 24, 1945 agreement—was fair and equitable to the lessor. I think that is all of the motion.

The Court: The motion will be denied.

Mr. Cooke: I think I will move to strike the remainder [828] of that answer on the ground that it is not responsive but rather evasive of the question that is asked. I do not mean intentionally evasive, but amounts to evasion, answering the direct question as to whether the percentage, etc., on that one page of the document are equitable and reasonable.

The Court: Motion denied.

Cross-Interrogatories

Questions and answers read without objection on part of plaintiff's counsel.

(Deposition of Thomas E. Hull.)

Mr. Platt: We move to suppress the deposition of the witness in answer to direct interrogatory No. 8 on the ground he has declined and refused to answer the cross-interrogatory as shown by cross-interrogatory 2, in regard to how much he needs for these various items where he says they are all covered by (b), which simply states, that answer is: "There should be ample revenue from this operation to pay taxes and all other taxes, including amortization of invested capital over a period of 20 years," and the following questions, (c), (d) and (e) asked for specific results on his computations. He simply refers back to that general question that there should be ample to cover all those things. The same with subdivision (f) of that same interrogatory, "Same as answer 'B'," ; just wants to make one general sweeping statement, "that ought to be sufficient to cover all those things." [829]

The Court: Motion will be denied, and counsel for defendants or defendants will be granted the privilege to further interrogate the witness on any of the matters mentioned in his deposition if at the time this case is submitted to the Court request for such permission is made.

Mr. Cooke: In that connection, I would like the record to show the envelope containing this deposition—does not show filing but shows it was mailed from Los Angeles on December 9, 1946.

The Court: The deposition will be admitted in evidence as Plaintiff's Exhibit "Z."

We will set this case for further hearing and trial December 18th at 10:00 o'clock at Reno. [830]

Wednesday, December 18, 1946, 10:00 a.m.

Appearances same as at previous sessions.

The Court: Gentlemen, are you ready to proceed now?

Mr. Platt: We are ready, your Honor. If the Court please, we have some additional depositions that are in the hands of the clerk, but in most part they are cumulative and we have decided not to offer them in evidence. Under the stipulation we have with counsel, they will be permitted to offer them in evidence if they so desire.

The Court: Do you reserve the right to introduce them if you should determine at a later time?

Mr. Platt: We thank your Honor for that privilege, but probably we will not offer them.

The Court: Anything further?

Mr. Platt: I would like to recall Mr. Denson.

P. G. DENSON,

having been previously sworn, was recalled and testified as follows:

Direct Examination

By Mr. Platt:

Q. Mr. Denson, Mrs. Mapes, one of the defendants, has testified here in substance that upon several occasions she sought an interview or interviews

(Testimony of P. G. Denson.)

with you in order to make preparations toward the drawing of a lease and in consideration of its terms. Has Mrs. Mapes ever sought such an interview with you? A. Never, at no time. [831]

Q. Has any one of the defendants in this action ever sought such an interview with you?

A. There has never been a word said about it, Mr. Platt.

Q. Has any person purporting to be an attorney, a representative, or agent of any one of the defendants ever sought such an interview with you?

A. At no time, never.

Q. Mrs. Mapes also testified that she phoned you on or about August 9th for such an interview. Is that true?

A. I do not think that Mrs. Mapes—I do not think the record will show that she made that statement. I think she testified that she phoned Mr. Moorehead, but Mrs. Mapes did phone me.

Mr. Cooke: You say August 9th, you don't state what year, Mr. Platt.

A. 1945.

Q. But directing my question to this particular thing, did Mrs. Mapes at any time phone you from any place for an interview to get together and confer with respect to the lease?

A. Absolutely not, at no time. I would like to straighten out and make that clear about August 9th, that was 1945, that she phoned to me. She said, "Mr. Denson, let's get together on this hotel and we can have a meeting in Reno or San Fran-

(Testimony of P. G. Denson.)

cisco," and I was the one that phoned Mr. Moorehead myself. The record will show that.

Q. That was before Mrs. Mapes signed the contract? [832] A. Oh yes.

Q. Or before the execution of the contract by all parties on October 4, 1945?

A. Yes, over a month and a half.

Q. Charles W. Mapes, Jr., one of the defendants, testified that he had a conversation with you in your room at the Sir Francis Drake Hotel on or about April 1, 1946?

A. It was April 1st in the afternoon in my room.

Q. You had such a conversation?

A. I had a conversation with him, yes.

Q. And was anybody else present?

A. Just he and I.

Q. He also testified that the conversation referred particularly to his request for an arrangement with you whereby he was to share 70 per cent and you 30 per cent of the contract or lease. Did such a conversation ever take place?

Mr. Cooke: Objected to—that has already been gone into when he was on the stand before. He testified, as I recall, he wasn't interested in anything of that sort and no such talk was ever had. My recollection of it.

The Court: Objection overruled. Answer the question.

A. There was nothing said in regard to the percentage of the deal at all. There was nothing said in regard about us getting together in regard to per-

(Testimony of P. G. Denson.)

centages. I stated before what our meeting was there, in regard to getting me to give up the [833] sky room. That was the whole thing.

Q. That was the entire conversation?

A. That was the entire conversation.

Q. There was nothing said at all by either one of you about a 70-30 split between you and Mr. Mapes?

A. Mr. Platt, I never heard of it at all until the suit started.

Q. It has been testified here that you were in the office of Mr. Cooke, the attorney for the defendants, on September 24, 1945.

A. That couldn't have been.

Q. Wait until I ask the question. Were you in Mr. Cooke's office on September 23rd, 24th or 25th?

A. I was not in Mr. Cooke's office on any of those dates. The first time I was in Mr. Cooke's office was October 4th.

Q. 1945? A. 1945, yes sir.

Q. You have already testified that you were in Mrs. Mapes' home on September 23rd?

A. That is correct.

Q. And that Mr. Cooke was also present?

A. He was.

Q. And may I inquire was September 23, 1945, a Sunday? A. It was, yes sir.

Q. And after that interview at Mrs. Mapes' home on September [834] 23, 1945, what time did you leave Mrs. Mapes' home?

(Testimony of P. G. Denson.)

A. I would say it was around six o'clock, or it might have been a little later.

Q. In the evening?

A. In the evening, yes sir, after dinner. I had dinner there.

Q. And then where did you go?

A. I went to Sacramento and spent the night there at the Clunie Hotel.

Q. Was your car out in front of the house?

A. It was, yes sir.

Q. And you got in the car and went to Sacramento?

A. Mrs. Mapes was at the car when I left; told me goodbye.

Q. And you drove directly to Sacramento?

A. Directly to Sacramento, yes sir.

Q. How long did you stay in Sacramento?

A. Stayed there all night.

Q. At what hotel did you stay?

A. At the Clunie Hotel. The records will show it.

Q. How long did you remain there?

A. I left Sacramento before day light and drove to Visalia, stayed in Visalia about two or three hours, transacting some of my business, and then drove on to the Biltmore Hotel at Los Angeles and registered at the Biltmore Hotel on the 24th. Was there for dinner.

Q. And as I recall, it was there at the Biltmore Hotel that [835] you received the contract signed by Mrs. Mapes?

(Testimony of P. G. Denson.)

A. The contract was to be sent to me air mail special so I would get it the morning of the 25th, so that I could take it up with Mr. Gock, and I phoned to Mr. Moorehead as soon as the contract arrived and he came to the Biltmore Hotel and then arrangement was made with Mr. Gock for meeting with myself. I believe Mr. Gock made an appointment with Mr. Clark, the president of the Occidental Life Insurance Company, for Mr. Moorehead and myself. Mr. Moorehead had the plans with him. I only had this contract.

Mr. Cooke: I move to strike all that as not responsive.

The Court: That is correct. That part not responsive may be stricken.

Mr. Platt: That is not responsive.

Q. Mr. Mapes testified, as I recall it, that on January 25, 1946, you did not interview Mr. Hopper by yourself, is that true?

A. That is not true. I did interview Mr. Hopper by myself.

Q. On January 25th?

A. On January 25th, this year, yes.

Q. And at what time of day did you interview Mr. Hopper?

A. I would say between 10 and 11 o'clock.

Q. In the morning? A. In the morning.

Q. And after the interview did you report the interview to Mrs. Mapes?

A. I went from there to the office where Charles

(Testimony of P. G. Denson.)

and Mr. Moorehead were and I had Charles phone his mother. I can't say whether I talked to Mrs. Mapes or Charles, but anyway appointment was made for me to call for Mrs. Mapes at quarter to two to take her to Mr. Hopper's office and that I did.

Q. Did you keep that appointment?

A. I did, yes sir.

Q. And you took her to Mr. Hopper's office?

A. I did, yes sir.

Q. And you discussed, the three of you, the so-called desire for the 12-foot strip?

A. That is correct, yes sir.

Q. There has been evidence here that you stated to Mr. Mapes and to Mrs. Mapes that you wanted the contract signed so that you could show it? Why did you want to show the contract?

A. There was only person I was interested in showing that too, that was Mr. Gock. I didn't care to talk to Mr. Gock about the loan for the building unless it was something I was interested in myself.

Q. So that was your only reason for wanting the signed contract?

A. The only reason, that is correct.

Q. Did you tell both Mrs. Mapes and Charles that that was the [837] reason why you wanted her to sign the contract?

A. I am informed that I wouldn't go to Mr. Gock and ask for a loan for them unless I had a contract for myself. It would not be businesslike. That was why we had the discussion.

(Testimony of P. G. Denson.)

Q. After you received the contract signed by Mrs. Mapes at the Biltmore Hotel on September 25, 1945, did you phone Mrs. Mapes? A. I did.

Q. And when you phoned was anybody else with you?

A. I don't remember whether Mr. Moorehead was there or not. After reading the contract, the clause in there that she objected to, that was supposed to have been left out, that was the part that Mr. Cooke was to redraft to leave out the clause that she objected to, but it wasn't left out. In fact, I wanted it in. It was Mrs. Mapes' direction, she objected to it very seriously. I think it mentioned the income from the entire building. It didn't mention the stores and I called Mrs. Mapes on the phone and she said, "Mr. Denson, did you get the contract?" I said, "Yes, I have, but I notice Mr. Cooke, the clause you so seriously objected to, is in there, but it does not take in the stores," and she says, "Mr. Denson, it takes in everything." I said, "All right, Mrs. Mapes, I will insert them, the income from the entire building, which I did, I typed it in there, and I said, "Then we can have it initialed when we get back." [838]

Mr. Cooke: I don't think that was responsive to the question, except the first two or three words. I move to strike.

(Question read.)

The Court: That is not responsive.

Mr. Platt: I would ask him, what was the conversation—I will ask you that question.

(Testimony of P. G. Denson.)

Q. What was the conversation?

Mr. Cooke: He has already testified.

Mr. Platt: All right then, we include that as being the answer, if agreeable to the Court.

The Court: Objection overruled. Answer the question.

A. The phone call was for the purpose of, in regard because it left out the stores from the total income of the building.

Q. As you have just testified with respect to that portion of the testimony objected to by counsel?

A. That is correct. That it was initialled in his office on October 4th.

Q. After Mrs. Mapes signed the contract did you ever phone her with respect to the loan that you were attempting to get for the building?

A. After Mr. Moorehead and I had called—I am not sure whether about the interview with Mr. Gock on the 25th or not—it might have been the 26th. [839]

Q. Of September?

A. Of September of 1945 and I wanted a letter of introduction to the president of the Occidental Life, I didn't know him. Mr. Gock said, "Peter, I am not going to write a letter, I will phone him now and make an appointment, and I told him I wanted to bring Mr. Moorehead; he had the cost sheets and blueprints and could probably explain it more thoroughly than I could. The appointment was made then for the next day with Mr. Clark, the president, and I presume we spent probably an hour and a half with Mr. Clark. They said that \$300,000

(Testimony of P. G. Denson.)

was the limit which the insurance company in Sacramento could loan, as Mr. Wright that they speak about so much, had said was the limit they could loan and that is why the Occidental Life Insurance Company came into the picture and then he spoke about being connected with the Bank of America, then wanted to know what Denson interviewed Gock about.

Mr. Cooke: Will you read that question?

(Question read.)

A. I did.

Mr. Cooke: I move to strike——

The Court: The answer heretofore given is stricken.

Q. What was the conversation? In order to save time, your Honor, I desire to ask Mr. Denson as to whether the conversation he had with Mrs. Mapes was the same conversation that you recited in that part of your answer which was objected to by [840] counsel?

A. I can give you my conversation with Mrs. Mapes in regard to our interview with Mr. Clark.

Q. All right. State what it was.

A. I informed Mrs. Mapes, as I had promised I would phone her as soon as I knew anything—I informed Mrs. Mapes that Mr. Moorehead—in fact, Mr. Moorehead was with me in my room at the Biltmore Hotel at the time——

Q. (Interrupting) Do you remember what date you phoned her?

(Testimony of P. G. Denson.)

A. I would say the 27th of September.

Q. 1945?

A. Yes, I am pretty positive that is the date. I can be mistaken, but I am almost positive that is the date.

Q. What was the conversation?

A. The conversation was that we had interviewed him and it looked very good and that she would receive some forms for her to make her financial statement and I said, "Mrs. Mapes, make it up because you will have to make it up with any insurance company you have business with." I said, "It looks very good. I am well satisfied with our meeting Mr. Clark, probably spent an hour and a half with him," and I turned the phone over to Mr. Moorehead and he also spoke to Mrs. Mapes about the appointment.

Q. Did you hear what Mr. Moorehead told her?

A. I think he stated the interview in our office and—— [841]

The Court: (Interrupting) I think it would be better to answer yes or no and then wait for further questions from Mr. Platt.

A. Yes sir.

Q. Did you hear what Mr. Moorehead said over the phone to Mrs. Mapes? A. I did, yes sir.

Q. Do you recall what he said?

A. He stated to Mrs. Mapes, "It looks very good" and he felt positive we would be able to get the loan through the Occidental Insurance Company.

(Testimony of P. G. Denson.)

Q. While you were talking to Mrs. Mapes upon that occasion, do you recall what she said to you?

A. I think she was very much pleased about it——

Q. (Interrupting) What did she say to you over the phone? A. She expressed——

Mr. Cooke: (Interrupting) I move to strike that as not responsive.

Mr. Platt: No objection.

The Court: It goes out.

Q. What, as nearly as you recall, did Mrs. Mapes say over the phone to you on that occasion?

A. "Well, that's just fine, Mr. Denson." Something to that effect.

Q. Mr. Denson, certain portions of Mrs. Mapes' testimony have [842] been called to my attention, in which she testified that she told you that the preliminary agreement had run out. Did she at any time or any place ever make such a statement to you? A. No.

Mr. Cooke: That isn't her testimony, Mr. Platt.

Q. She also testified that you brought the agreement in triplicate to her and said, "It is only a preliminary agreement" and that later she told you that the agreement of September 24, 1945, was not functioning. Did you ever have such a conversation with Mrs. Mapes? A. No.

Q. Did she ever make any such statements in substance to you? A. No.

Q. Or did you ever make any such statements to her? A. No, I did not.

(Testimony of P. G. Denson.)

Mr. Platt: I think that is all.

Cross-Examination

By Mr. Cooke:

Q. In regard to this loan, Mr. Denson, that you told us about in your direct examination a moment ago, what was the maximum amount that was contemplated you would be able to get by way of a loan?

A. Mr. Moorehead had the sheet with him which is in evidence right here and it only shows 625 thousand he was asking for and in my presence that was the only amount that was spoken to [843] Mr. Clark by Mr. Moorehead. That is the amount we talked to Mr. Clark about, 625 thousand.

Q. And prior to that had Mrs. Mapes ever told you what the loan requirement would be, the maximum and minimum amount that would be required for a loan?

A. Mrs. Mapes never mentioned anything to me in regard to any amounts.

Q. You knew it was contemplated that the hotel building was to cost at least 800 thousand dollars, did you not?

A. That is right. In fact, the sheets showed it was more. I think it was 860 thousand or 865 thousand and you have another sheet, 885 thousand, offered in evidence here. I gave them to Mr. Platt. Those are Mr. Moorehead's figures.

Q. Have you considered the matter as to whether the hotel, costing 800 to 850 or 860 thousand, as you have mention, could be constructed under the cir-

(Testimony of P. G. Denson.)

cumstances with the finances available, plus a loan of 600 or 625 thousand?

A. If I remember correctly, I think that the financial statement that Mr. Moorehead made up, Mrs. Mapes was to put in 270 thousand dollars herself. I didn't estimate the cost of the building. Mr. Moorehead was the builder of it and was furnishing the figures. I did inform him that the figure he had set up to show the insurance company, 150 thousand dollars, wasn't anything like enough to furnish it but he insisted it would and I knew it wouldn't. [844]

Q. What figure was it finally decided upon necessary to furnish it?

A. At no time was there any amount. Charles and I had discussed it and I told Charles the proper amount was 250 and maybe 300 thousand dollars.

Q. Did you think that was enough?

A. My estimate on that ran from 250 to 300 thousand to furnish that place.

Q. Of course, the first figure you just mentioned of this 150 thousand, at that time was for a 10-story building?

A. That was not my figure at all, Mr. Cooke, and don't try to put that in the record.

Q. Just answer my question. At that time that was based on a 10-story building, wasn't it?

A. I believe it was, yes; in fact, I feel sure that it was.

Q. In reference to the clause about the income from the entire building, that is to say the clause

(Testimony of P. G. Denson.)

that was inserted there on October 4th, you remember that in the contract of September 24th?

A. Yes.

Q. I understood you to say that the reason for bringing that paper that you and Mrs. Mapes had discussed before coming to my office, was to have that clause written in and I didn't write it in?

A. At no time did I say I thought it was up to you. At no [845] time did I so testify.

Q. How did this paper come into my hands for redrafting?

A. You came to Mrs. Mapes' house that Sunday afternoon by request of Mrs. Mapes. I think Mrs. Mapes phoned you herself and we had been trying to get Mrs. Mapes to get you there all day, at least I had, and Saturday also, the day before.

Q. And the matter of my having the paper for redrafting purposes or changing in any way, how did that come up?

A. I am glad you asked that.

Mr. Cooke: I move to strike that.

The Court: That may go out.

A. Charles and I were discussing the agreement and Mrs. Mapes seemed to think for some reason or other we were trying—that I was, and of course, Charles was my partner—we were trying to get the rents of the stores and there was nothing in the contract that stated that. It was very plain and we were guaranteeing that her total income from the entire building would be sufficient to take care of

(Testimony of P. G. Denson.)

taxes and insurance, maintenance of the building, interest on the borrowed money and also amortize the loan over the life of the lease, 20 or 25 years, was the lease that we talked about, so finally I insisted on Mrs. Mapes sending for you and you came and I think that that sketch that we have, that has been so pencilled marked on there, Mr. Cooke, that you had and I was under the impression you were changing that in regard to taking out the taxes, [846] insurance and amortize the loan and all. Mrs. Mapes wanted just a straight percentage deal.

Q. Referring to that paper——

A. (Interrupting) The ones I brought I gave to you when you were in Mrs. Mapes' home Sunday afternoon, September 23rd, in her home.

Q. Do you mean the lead pencil interlineations and yellow sheet attachments were made at Mrs. Mapes' home?

A. I think you were making those changes there because I explained to you what Mrs. Mapes objected to, and I felt capable of explaining it to you.

Q. Well you said a while ago, as I understood you, the reason for submitting this paper to me was to put in the clause in regard to the income in figuring on the basis of the entire building and I didn't do it.

Q. It was given to you to take that clause out of it there and just make it subject to the rest of the agreement in regard to percentages and also

(Testimony of P. G. Denson.)

what percentage was called for in those rentals we had stipulated for each item was mentioned.

Q. Take what clause out?

A. The guaranty of her total income of the building, take care of taxes, insurance and upkeep of the building and interest on borrowed loan and to amortize the loan. That is the clause you were to take out.

Q. Where were Mrs. Mapes and yourself and myself at the time [847] you gave instructions to send the draft, or redraft, when I got it ready, to the Biltmore Hotel and endorse the envelope "Please Hold"?

A. Right in Mrs. Mapes' home that afternoon.

Q. It wasn't in my office?

A. It was not in your office, no sir.

Q. Where was the notation made that was interlined and initialed by you and Mrs. Mapes and Charles Mapes? Where was that made?

A. Where was it initialled?

Q. Well, yes, both.

A. In your office it was initialled on October 4th, when we all signed.

Q. How was it typed in there?

A. It was typed in just above there. It will speak for itself.

Q. I mean who typed it in, do you know?

A. Well, the one I have, the one you sent me, I typed that in and the one we all signed in the office was all type in.

(Testimony of P. G. Denson.)

Q. Where is the one sent to you that you typed?

A. It is here.

Q. Is that the one on file?

A. Yes, that is only signed by Mrs. Mapes, not signed by Charles, but witnessed by you and sent to me, mailed out of here on the 24th——

Q. (Interrupting) I am asking, Mr. Denson, about the condition [848] of this interlineation on October 4th. A. Yes.

Q. How many copies were interlineated with that clause about the entire building?

A. I presume that you interlineated the ones that you gave them, I don't know. The one that you gave me was typed in your office because that was the only one sent to me signed only by Mrs. Mapes. I think the check will show the difference in size of the type from the one I typed in before I took it to Mr. Al Gock. It will show for itself.

Q. In the envelope that was sent to you at the Biltmore Hotel with instructions to "Please Hold," I think you said there was just one copy of the proposed contract that was signed by Mrs. Mapes?

A. That is correct.

Q. You brought that back with you on October 4th? A. I had it too. I still have it.

Q. It is filed here now in the case?

A. Yes, but it has been in my possession all the time.

Q. That was never signed by the other parties, was it?

A. No; I have another one that was set up in

(Testimony of P. G. Denson.)

your office signed by all parties and witnessed by you and your secretary.

Q. Isn't it a fact that there were a number of other changes to be made in that tentative draft that you presented and that was the reason for my being called down here and discussing [849] the matter of this preliminary contract?

A. That was the only one there was any question about, was in regard to that particular clause that we just spoke of that was initialed.

Q. The one that you had a lot of blank lines in to be filled out?

A. Shall I tell what those blanks are for?

Q. No.

A. Well, we straightened the blanks out that afternoon.

Q. I am asking you a question—there were a number of blanks?

A. Dates and amount of money and also life of the lease.

Q. So those matters were discussed and the blanks filled out by lead pencil by me?

A. I presume you made it in lead pencil. I had to have blanks; I couldn't fill them in myself.

Q. The idea being the redraft should include what you had by way of contract, plus filling out of these blanks?

A. That was our idea, to fill those out. There was the amount of money to be deposited, life of the lease and also the date. Those are the three blanks if I remember correctly.

(Testimony of P. G. Denson.)

Q. You told us that you wanted this contract to show to a certain party. That certain party is Mr. Gock, is that right?

A. I don't think I so said I wanted the contract. Charles and I were supposed to get our contract from Mrs. Mapes. I don't think I told them I wanted the contract. As I stated [850] before, I wouldn't go to Mr. Gock to try to negotiate a loan unless I had a contract myself showing I was involved in the deal and was one of the partes.

Q. You didn't make a statement in my office, at a conference there, in answer to my question as to why it was proposed to have this preliminary agreement when you were going to agree upon a lease within a matter of ten days or so.

Mr. Platt: Just a minute, wait a minute. Mr. Denson has testified there was no conference in Mr. Cooke's office, your Honor, prior to October 4, 1945, when the agreement was signed. That questions assumes something not in evidence, that isn't in evidence.

Mr. Cooke: I might ask whether it isn't a fact.

(Question read.)

The Court: Is that your complete question, Mr. Cooke?

Mr. Cooke: Well, no, I hadn't completed it.

Q. —that you wanted this paper to show, or words to that effect, is that correct or not?

The Court: Objection overruled. Answer the question.

(Testimony of P. G. Denson.)

A. There was no such conversation at all, Mr. Cooke, in your office in regard to the contract. The only thing about it, I showed you where I typed in in regard to that clause. There was nothing said about any preliminary agreement, about drawing a lease, except what I spoke about the lease when I made my deposit. [851]

Q. Will you answer the question—was there any such conversation?

A. No such conversation.

Q. Isn't it a fact that you had urged upon Mrs. Mapes on a number of occasions to give something in the way of a contract for you to show before Mr. Gock was in the picture at all?

A. I didn't urge Mrs. Mapes at no time.

Q. What were you doing there those three days, were you talking about this contract or hotel business.

A. I would like to answer that.

Q. Were you talking about hotel business?

A. I met Charles in Sacramento on the 21st, on a Friday. He drove his car, I drove my car. Charles had phoned to me to make an appointment for he and I to come over and get our contract with his mother. We met in Sacramento. We had dinner. Charles wanted to stay longer than Saturday morning, so therefore we drove both cars. We arrived to visit with Mrs. Mapes that evening and I told Mrs. Mapes that I wanted for her to get hold of her attorney and let us get our agreement fixed up, that is the agreement that I had with her, and Mrs. Mapes insisted that I stay over. I kept

(Testimony of P. G. Denson.)

trying to tell her that I should go back, that I had a lot of things to attend to, and to get hold of her attorney—I didn't even know you, Mr. Cooke, didn't know who her attorney was—so I finally agreed to stay over and Mrs. Mapes and I took a ride that morning and that afternoon Gloria and I and Charles all went to the football game and then she entertained us at cocktails that evening and had some friends for dinner she wanted me to meet, so we all went to dinner. All Sunday morning we tried to get together to get this contract signed, so that I could leave. I urged Mrs. Mapes to get her attorney so she could see what it was. I didn't see that there was anything complicated about it. There was no trickery in it because I don't deal that way. That was why I was there Friday evening, all day Saturday and all day Sunday until four o'clock until that Sunday afternoon.

Mr. Cooke: I move to strike the answer as not responsive.

The Court: It may stand.

Q. I will ask you again, what were you doing these three days if you were not talking about the hotel and the contract?

A. I think I stated.

Q. Have you anything further to add?

A. Nothing further to explain. Constantly urging and finally Charles did tell his mother in the afternoon, he said, "Mother, I think we ought to get together." I said I didn't want Mrs. Mapes to

(Testimony of P. G. Denson.)

sign up anything unless she was represented by counsel, Mr. Cooke.

Q. Well, have you answered the question now fully?

A. I think I have answered fully what I was doing all that time. [853] If you would like to know where we went, I think I can explain it to you.

Q. You testified on your direct examination that Mrs. Mapes never sought an interview with you in regard to your getting together on drafting of a final lease?

A. That is correct. At no time did Mrs. Mapes ever try to get together in drafting a final lease.

Q. How about you, did you ever try to get together with her?

A. I did not. The only time I spoke about it was when I gave my check for ten thousand dollars. I know they were there but it seems no one heard it.

Q. And at that time I think you testified you said for me to go home and draw the lease?

A. I said, "Mr. Cooke, any time you want to draw the lease, I am ready to sign", and I have always been ready to sign it, Mr. Cooke.

Q. You said that to me?

A. Yes, but no one seems to have heard it; in your office when I gave my check for ten thousand dollars.

Q. The only discussion in regard to the lease was the clause of this entire building?

A. The only discussion about the document was

(Testimony of P. G. Denson.)

what Mrs. Mapes objected to, as I stated, and no discussion about the thing at all in your office, but simply to initial what I had inserted in there and everybody signed and you witnessed all the signatures, [854] accepted by ten thousand dollars, gave me a receipt——

Q. Yes, yes.

A. Well, what more do you want?

Q. I just asked you if you made that statement to me?

A. I told you what took place in your office and that is all that was said.

Q. Did it occur to you that I had sufficient information or data from either you or Mrs. Mapes to draw a lease?

A. There would be sufficient data from that document itself for any one to draw a lease from. I am perfectly familiar with leases, Mr. Cooke, I have drawn them myself.

Q. The lease provides further and additional matter inserted for protection of the parties.

A. I would never want any lease whereby the lessor was not protected just the same as the lessee.

Q. You are not answering my question.

Mr. Platt: Objected to as argumentative. I don't know why legal propositions——

The Court: That is a question for a legal opinion.

Mr. Cooke: Well, my thought was that he made the statement that he told me to go ahead and draw

(Testimony of P. G. Denson.)

the lease, to find out whether he knew or assumed I had sufficient data to draw a lease.

The Court: He already answered that. He said he thought you did. [855]

Q. Why do you make that statement?

Mr. Platt: Objected to——

The Court: Objection sustained.

Mr. Platt: That is to the previous question.

A. Just state the question you are asking me now.

Q. You testified repeatedly you said to go ahead and draw the lease and you were ready to sign it, or words to that effect.

A. I did not make that statement.

Q. What was the statement? Let us get that straight.

A. I said, "Now, Mr. Cooke, the next thing to do, any time you want to draw the lease, I am ready to sign." I didn't say, "You go ahead and draw the lease." I didn't say that.

Q. The statement is——

A. (Interrupting): I said I was ready to sign the lease any time it was drawn up and I was and I am yet.

Q. You knew the only conference I had with you and Mrs. Mapes in regard to what was to go into this preliminary agreement was the meeting we had that day?

A. September 23rd was the only time I met with you.

(Testimony of P. G. Denson.)

Q. You are familiar with leases?

A. Yes.

Q. And the matter of drawing leases?

A. Yes, I think I can draw leases very intelligently. I have drawn them.

Q. I would like to ask you a question, whether you believed, [856] when you said you were ready to sign the lease any time I had one drawn, that I had sufficient information or data in regard to drawing a lease as to what you and Mrs. Mapes had agreed upon?

A. Knowing you were an attorney, I don't think any attorney would attempt to draw a lease that was not fair to his clients and also to the lessees, of you are representing the lessors, because Charles and I would have been the lessees, and I felt that lease would have been drawn that would have been fair, would cover all laws of the State of Nevada, city and county and everything else. Those are always embodied in any lease.

Q. That is the only answer you have to that question?

A. I think that is the only answer I have to that question, yes.

Mr. Cooke: I think that is all.

Re-Direct Examination

By Mr. Platt:

Q. Just one matter, Mr. Denson. There was some testimony given to the effect that a paper or document was submitted by you to Mr. Cooke as

(Testimony of P. G. Denson.)

a basis for his drawing the final agreement; that there were certain blank spaces to be filled in and that was the condition of the paper which you handed Mr. Cooke? A. That is right.

Q. Well, now, when you received the agreement signed by Mrs. [857] Mapes at the Biltmore Hotel in Los Angeles on September 25, 1945, were all the blank spaces filled in?

A. May I answer that in regard to those blanks, what they were?

Q. Will you answer the question?

A. Yes, the blanks were filled in.

Q. Now you didn't fill in those blanks?

A. I didn't, no.

Q. When the paper came to you from Mr. Cooke's office, all those blank spaces were filled in?

A. They were all filled in.

Q. And when the document or the contract or agreement in evidence here was signed by all of you, there had been no change made at all as to the filled-in blank spaces? A. No changes, no.

Q. In other words, the filled-in blank spaces remained just as they were when you received the paper from Mr. Cooke's office?

A. Absolutely.

Mr. Platt: I think that is all.

Mr. Cooke: That is all.

Mr. Platt: If the Court please, we wanted to ask Mr. Moorhead a few additional questions and we phoned him yesterday. I did not do it personally, but Mr. Denson and Mr. Sinai did and he is still

indisposed and said he couldn't be [858] here. Outside of his testimony, I think that is our case in chief, your Honor.

The Court: What is the nature of his illness? Is he required to be absent for some considerable time?

Mr. Sinai: Well, the information I had through a letter from him and also from a phone conversation with him, he had ear trouble, trouble with his ear.

Mr. Cooke: I think that is it. It is some serious ear trouble.

The Court: Do you suppose now a statement from Mr. Platt what he expected to prove from Mr. Moorehead, you could stipulate as to what he would testify?

Mr. Cooke: Of course, I don't know, but I would be willing to consider the matter and to so stipulate unless he is——

The Court: Would you be willing?

Mr. Platt: Yes, your Honor. I will have to have a little while to prepare it.

The Court: Then with that understanding the plaintiff rests.

(Short recess.)

The Court: Are you ready, gentlemen?

Mr. Cooke: I wish to offer in evidence carbon copy [859] of letter dated June 17, 1946, from myself addressed to P. G. Denson, care of Platt & Sinai, First National Bank Reno, Nevada, together

with reply thereto on letterhead of Platt & Sinai, dated the same day, signed Platt & Sinai.

Mr. Platt: We have no objection.

The Court: It may be admitted in evidence as Defendants' Exhibit 2.

Mr. Cooke: The letter first mentioned is dated June 17th, 1946, and reads: (Reads letter.) I am reading from carbon copy of the letter. There is notation, "Enclosure 1". The reply thereto from the office of Platt & Sinai, dated the same day, reads: (Reads letter.)

Call Mrs. Mapes.

MRS. CHAS. W. MAPES

having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. How long have you lived in Nevada, Mrs. Mapes? A. About 30 years.

Q. And was all of that time spent in Reno; that is, you have lived in Reno, that is your home?

A. Yes.

Q. And your husband was Charles W. Mapes, Sr.?

A. Yes.

Q. He died when? [860]

A. The day after Christmas in 1937.

Q. From the time you were married to him until he died he was engaged in the banking business

(Testimony of Mrs. Chas. W. Mapes.)

here in Reno, was he not? A. Until he died?

Q. Yes. A. No, up until 1929.

Q. That was the Washoe County Bank that he was connected with?

A. Yes, his father was one of the founders and he worked in the bank up to be the president of the bank.

Q. Do you know what office, if any, he held in the bank?

A. He was president of the Washoe County Bank.

Q. A Reno banking institution at that time?

A. Well, it was one of the very first, the oldest.

Q. In Reno?

A. Yes, right where the Ramos Drug Store is at the present time.

Q. Prior to your marriage, where did you live, prior to your residence in Nevada?

A. In Staten Island, New York City.

Q. During your residence in Staten Island, did you have occasion to come in contact with the matter of construction of buildings to any extent, directly or indirectly?

A. Yes, that was my family's business and my brother at the present time is one of the outstanding builders.

Q. Your brother is William S. Hart? [861]

A. Yes.

Q. And he has been here in Reno a number of times?

A. Five times since work has started.

(Testimony of Mrs. Chas. W. Mapes.)

Q. Did you have the benefit of his advice or aid or assistance in any way in the construction of the Mapes Hotel building? A. Yes, I have.

Q. He has been here five times?

A. And he is ready to come out now right after Christmas.

Q. Since the hotel started construction or since the matter of getting under way for construction, or what? When was it that he was here?

A. During the construction of the building.

Q. Well, can you give us an idea about what time he spent here during that time, the aggregate of these four or five times altogether?

A. He took on the general management of it. I think you can go over and talk to any one of the men working on the building and they highly regard him as——

Q. (Interrupting): That isn't what I asked you Mrs. Mapes. About how much time did he spend in connection with his work here?

A. All of his time with the exception of what little recreation he would have.

Q. How much was all of his time? Just give us an estimate. [862]

A. It is awfully hard to be definite, but each time he came he spent about three weeks or longer.

Q. He spent about all of that time on the hotel?

A. Yes, on the hotel; changed the plans.

Q. Did he discuss, so far as you know, the construction of the building and plans and specifica-

(Testimony of Mrs. Chas. W. Mapes.)

tions or the like, with Mr. Moorehead and Mr. Slocum?

A. Yes, he did, and they recognized his suggestions.

Q. His suggestions were adopted.

A. Yes. Our present superintendent begged him to stay right here with him, which has been the only superintendent we have had.

Q. There has been testimony introduced here that the matter of constructing a hotel on that lot started away back even before your husband died?

A. Yes.

Q. And it has been under way in one form or another since that time? A. Yes.

Q. And in 1940 you had some conferences with Mr. Denson and other people? You remember the testimony there in regard to the proposed hotel construction?

A. Yes, my conferences in 1940 were mostly with Mr. Huckins. All the matters that were interchanged and all conversations [863] were practically with Mr. Huckins.

Q. What I am getting at, Mrs. Mapes, is that you and those associated, interested with you, have had the matter of this hotel construction under consideration for years? A. Yes.

Q. During that time how many different plans, can you give us any idea, you have had under consideration?

A. May I say about four or five different sets, five or six different sets of plans.

(Testimony of Mrs. Chas. W. Mapes.)

Q. Did that mean different types of buildings and so on? A. Yes.

Q. How were those matters handled? Were they discussed and considered by you and the other members of your family and your brother, Mr. Hart, and so on?

A. I do not think I went deeply into it with any of the family on plans.

Q. Just yourself?

A. Just the hotel we were considering, whether there was any merit to it or not.

Q. That is the way this thing went along from this date you told about, 1940, down to the time of September 24, 1945, for instance, is that right?

A. Yes.

Q. The original plans, in sketchy form at least, was for a 10-story building, that is correct, isn't it?

A. Yes.

Q. At an estimated cost of 800 thousand dollars?

A. About that, yes.

Q. Or thereabouts? A. Thereabouts.

Q. When was it changed from that cost figure and from ten stories to what it is now, 12 stories? When was that change made? A. This year.

Q. What time this year about? Give us your best recollection.

A. I would rather not give you, but I can definitely find out. It doesn't come to me right at this time.

Q. Regardless of what particular time it oc-

(Testimony of Mrs. Chas. W. Mapes.)

curring, how did it occur, with regard to who decided upon the change? A. I did.

Q. By yourself?

A. Well, with Charles and Mr. Moorehead and Mr. Slocum. I wanted the height of the building at a later date so we could go up on the First Street side and make it a "U".

Q. Was Mr. Denson consulted in any way in regard to the proposed change? A. No.

Q. Why not?

A. I believe he was out of it. I don't recall whether he was or not. I would have to go into that, Mr. Cooke, if you want [865] it as a sworn affair.

Q. Well, your recollection now is you don't recall whether he was or not, is that right?

A. Yes.

Q. But you were the one, as I understand your testimony, that decided on it?

A. I want to say definitely that he wasn't, as I recall.

Q. You want to say that he wasn't?

A. I think I am correct there. I would have to check it.

Q. He wasn't consulted, you mean?

A. Wasn't consulted.

Q. Well, that is your best recollection?

A. Yes.

Q. Did the idea of increasing from 10 to 12 stories originate with you or was it suggested by anybody?

A. It was my idea. It was my idea to get the height of the building a certain height.

(Testimony of Mrs. Chas. W. Mapes.)

Q. From what source, if you know, was the figure of about 800 thousand estimate for the 10-story building obtained?

A. Well, as I recall, it was just a rough figure to see what was going into the building and about the cost. That was Mr. Moorehead's idea.

Q. Was he the one that suggested the 800 thousand or about that?

A. About that, yes. There wasn't anything definite on it. [866]

Q. Do you know what additional amount of the estimate for the building was created, that is to say, what additional amount was contemplated, for the extra two stories after you decided on that?

A. Yes, it was over 200 thousand.

Q. For the two stories? A. Yes.

Q. Well, instead of the estimate of 800 thousand or thereabouts, what, so far as the building itself is concerned, is it going to represent in cost?

A. The present cost of the building?

Q. Yes. What is the building going to cost completed, if you know?

A. Well, we have borrowed on it 12 hundred thousand and we are putting 450 thousand of our own money into it.

Q. That makes 1650 thousand? A. Yes.

Q. And that takes in the cost of construction of the building. Does that include the furnishings?

A. That would be extra.

Q. In addition to that? A. Yes.

Q. You heard testimony of Mr. Denson, I think

(Testimony of Mrs. Chas. W. Mapes.)

he said somewhere around 250 to 300 thousand, thereabouts?

A. Well, I think it might be right to say around 400 thousand [867] for furnishings.

Q. So that would make two million fifty thousand?

A. I will take your addition, Mr. Cooke.

Q. For the final construction and furnishings of the building?

A. Yes.

Q. Complete?

A. Yes.

Q. And that does not include the lot?

A. No.

Q. What is the value of the lot, if you can tell us?

A. Well, I put a value on it of 300 thousand. I was offered more than that for it though.

Q. That is the value that you have on it?

A. Three hundred thousand.

Q. That would make a total then of two million four hundred fifty thousand?

A. If your addition is correct.

Q. Well, I don't guarantee it. The 800 thousand estimate that you have testified about, Mrs. Mapes, did not include anything, as I understand, for the lot. That was just construction of the building?

A. Yes.

Q. And it did not include anything for furnishing?

A. No.

Q. Just simply a 10-story building? [868]

A. Yes, and that wasn't a permanent figure at

(Testimony of Mrs. Chas. W. Mapes.)

that time. It couldn't have been a permanent figure at that time.

Q. I understand, it was a tentative estimate?

A. Tentative.

Q. Rather rough estimate, wasn't it?

A. Very rough.

Q. Now from the time that matter of constructing the hotel building, or a hotel building, on the lot first came up, have you been in close contact with the subject matter and had discussions with various parties?

A. I have until the actual construction started and then I depended since then on my son to represent me, but Mr. Moorehead and I all the time talk on plans and corrections and additions.

Q. Well, the testimony shows that you made numerous trips and had numerous conferences with the architect and with the construction engineer, Mr. Moorehead? A. Yes.

Q. Kept in close touch with the subject matter right along? A. Yes.

Q. You hear Mr. Denson's testimony this morning that at no time did you ever speak to him, either on the telephone or otherwise, about you and he getting together on a final lease, as contemplated set forth by the September 24th agreement. You heard that testimony? [869] A. Yes, I did.

Q. Have you anything to add to the testimony you have previously given as to the various times and occasions that you did ask him to come to Reno and get together on a lease?

(Testimony of Mrs. Chas. W. Mapes.)

A. Only those times that we were together I was continually after him to get together on this agreement and draw up our lease, I was continually after that.

Q. This agreement and draw up your lease?

A. Yes.

Q. You refer to the agreement in addition to the lease—you are talking about agreement between him and Charles?

A. He and my son Charles were to get together and agree.

Q. I think I asked you——

Mr. Platt: (Interrupting): I submit, your Honor, I am sorry, but the question referred to the lease contemplated by the agreement and the answer with respect to an arrangement between Charles and himself.

The Court: That portion of the answer with the exception of anything in regard to the lease may be stricken.

Mr. Platt: I don't like to object and I have made but very few objections, but I do not think the answer is responsive.

Mr. Cooke: Well, at various times in your testimony you referred to agreement and you also mention a lease. What [870] do you mean?

A. Well, my son Charles and Mr. Denson were to get together to agree on their association so that we could draw up a lease on the management and how the hotel was to be handled, etc., like that. You

(Testimony of Mrs. Chas. W. Mapes.)

couldn't just give a lease when you didn't know who or what was what.

Q. When you used the term agreement, as you have at various times, you were referring to the agreement or arrangement between your son and Mr. Denson?

A. Yes. That was understood before, in my presence, that is why I knew about it, Mr. Cooke.

Q. If you had supposed that you would be called upon to give a lease to Mr. Denson alone—did you ever consider that? A. Absolutely not.

Q. To what extent did Charles figure in it, insofar as it being the principal subject of your interest?

A. Knowing our background, knowing our financial background, I was interested in Charles being interested in the hotel.

Q. Well, is it true that all these different years that you told us about that you were planning and finally determined on building a hotel was for his benefit primarily? A. I told you that.

Q. Gloria was to have some——

A. (Interrupting): Well, she was to have some financial part of it. I can't be one-sided with one child. [871]

Q. In reference to Gloria, in any of the conversations you had with Mr. Denson, either in your home at Reno or in the city—I have reference to the one at the Drake Hotel or the Fielding, or any of them where Gloria was with you, can you say

(Testimony of Mrs. Chas. W. Mapes.)

whether or not the matter of a lease, or proposed lease, from you to Mr. Denson and your son Charles was discussed in the presence or hearing of Gloria?

A. No.

Q. It was not? A. Never, no.

Q. She is how old now?

Twenty-one, almost 22.

Q. And during the fall of 1945 or in September, October and November, what was she doing?

A. Well, she was attending our University and my daughter is very active, both on the campus and off the campus and we see very little of her at home. In fact, she has classes at eight o'clock. She leaves home before eight, she returns home in time for dinner and after dinner there are always meetings or we have business at the library or socials.

Q. On the occasion that Mr. Denson was at the house for two or three days, if I am not mistaken in January, January 25, 1946, do you remember whether Gloria was present at any discussions at which the business of the hotel came up?

A. No, she wasn't. [872]

Q. Does she ever participate in the business discussions of the hotel or any other business transactions?

A. Well, not to any great extent. She has in some things. I have asked her to sit in when she was at home and had the time.

Q. Now in September, 1945, September 23rd and

(Testimony of Mrs. Chas. W. Mapes.)

24th and that immediate period, was she attending school at that time, as you have stated?

A. Yes.

Q. When Mr. Denson was down at the house?

A. Yes, she was.

Q. That was before this September 24th paper was signed? A. Yes.

Q. And there were some discussions and conferences had there at which you were present and Mr. Denson was present and I was there for a time, down to your house, do you remember that?

A. Yes. The only discussion about this paper was that evening before you came, if that is the correct date, with Mr. Denson and Charles and myself. Gloria wasn't at home.

Q. That is what I was going to ask you, if she was there at any time?

A. No, she wasn't there.

Q. And from then on for the next several months are you in position to say whether or not she had any actual knowledge or notice of Mr. Denson and your son Charles having some [873] kind of agreement in regard to a lease on that hotel building?

A. I do not think she knew anything about it until about April.

Q. April, 1946? A. Yes, 1946.

Q. Do you know how she learned of it at that time?

A. Well, this little disagreement, or whatever you want to call it, came up and we were discussing that and she would ask what it was, what was the

(Testimony of Mrs. Chas. W. Mapes.)

trouble and I think I explained to her at that time.

Q. I think you already testified about what Mr. Denson told you in regard to his sale of the hotel in Visalia.

The Court: If you are about to start another subject, Mr. Cooke, we will take our noon recess until 2:00 o'clock.

(Recess taken at 12:00 noon.)

Afternoon Session, December 18, 1946, 2:00 p.m.

Appearances same as at previous session.

Mrs. Mapes resumed the witness stand on further direct examination by Mr. Cooke.

Q. Mrs. Mapes, do you know from present plans of the hotel building what the garage capacity will be? A. About 70 cars. [874]

Q. That would be in the basement?

A. In the basement.

Q. This preliminary agreement of September 24, 1945, states that if the garage is to be included in the lease when drawn, 10 per cent of the gross proceeds are to be paid by the lessee, Mr. Denson and Charles W. Mapes, Jr., to you, while if it is leased to somebody else, then Mapes and Denson shall have the right to have garage space reserved for the use of their guests on such terms as may be agreed upon. Do you remember that clause in the agreement? A. Yes, I do.

Q. Was it ever discussed between you and Mr. Denson and your son Charles as to what charge, if

(Testimony of Mrs. Chas. W. Mapes.)

any, should be made on cars that were stored or had garage service? A. No.

Q. Do you recall anything being said at all by either your son Charles or Mr. Denson about the garage subject other than stated in the paper itself?

A. No.

Q. You say that the garage will have a capacity of about 70 cars. Would that be sufficient, do you believe, from all that you know about the operation of the hotel, etc., to satisfy the hotel service itself, or would there be space to rent out taking in other cars?

A. Well, it wouldn't be sufficient to carry the hotel itself, [875] no.

Q. In other words, the hotel people will need all the garage service and space? A. Yes.

Q. What about other service of cars arranged for in the basement, such as gasoline and the like of that? Has anything been decided about that as part of the garage?

A. Just if it were necessary. I don't think it has ever been discussed, no. It has never been discussed, the garage hasn't, in any way.

Q. You say 75——

A. (Interrupting) I say about 70.

Q. About 70 cars and it would be barely sufficient for the hotel customers. Does that mean it would be capacity full all the time, in your opinion?

A. Yes.

Q. Is that what you mean to say? A. Yes.

(Testimony of Mrs. Chas. W. Mapes.)

Q. I think you told us, or started to tell us, in previous testimony about some conversation you had with Mr. Denson about the Visalia hotel in which he said something about he was on a deal to sell it. Do you remember when you first heard that subject discussed?

A. When Mr. Denson first came to see me in '44 he told me at that time that he planned to sell the lease on his hotel, that [876] he wanted to get out of Visalia and that this was a seller's market and a very good opportunity to sell.

Q. Did he say anything about selling on the basis of loss or profit?

A. No, it was a profit. I think at that time he was talking about one or two places he was going to go in business. I am sorry I can't tell you the names.

Q. That was in 1944?

A. That was in 1944.

Q. Was the subject of the sale of his hotel discussed at any time after that?

A. Then he told me, I believe, in November of '45, was the first I heard of the hotel sale again, when he said he thought he had somebody to purchase his hotel.

Q. Did he have anything to say whether that sale was on the basis of loss or profit?

A. He told me at that time it was a pretty good sale.

Q. He didn't mention any figures?

(Testimony of Mrs. Chas. W. Mapes.)

A. Not exactly figures, but I thought it was around 40 or 50 thousand he had made on it.

Q. That was in November, you think, of 1945?

A. Yes.

Q. Did you hear any discussion—

A. (Interrupting) No, that was later. He didn't discuss that but the first I had heard of his sale, that he had an opportunity [877] to sell his place, was in November of 1945. That was the first I ever heard after that conversation in 1944.

Q. When was the conversation had at which he mentioned about what he expected to make out of it?

A. I think when he was here in January.

Q. '46? A. Yes, '46.

Q. Do you remember anything about what he said on that subject at that time?

A. Well, he was pretty well satisfied with the sale.

Q. I asked you to state what he said.

A. I don't recall the conversation on it.

Q. That was the tenure of it as near as you can recall? A. Yes.

Q. In your previous testimony, in reference to the matter of the co-partnership certificate, Mr. Platt asked you some questions in regard to it and you said that it was registered in Carson City. Do you remember that? A. Yes.

Q. What makes you say it was registered in Carson City.

A. Well, I don't know why I said it, Mr. Cooke. You handled that for me.

(Testimony of Mrs. Chas. W. Mapes.)

Q. It is registered by the country clerk here.

A. Well, I am sorry, I know it is registered and if there is any question about its validity, we could check that. [878]

Mr. Cooke: That is all.

Cross-Examination

By Mr. Platt:

Q. Mrs. Mapes, there was offered in evidence here—I make this preliminary statement in order that you understand the question that I propose to ask you—there was introduced in evidence here a letter dated June 17, 1946, signed by your attorney to us, offering to return the ten thousand dollar check which Mr. Denson had deposited. There is also in evidence here that on the 10th of April, while Mr. Denson was in Mr. Cooke's office, Mr. Cooke told Mr. Denson that he was satisfied Mrs. Mapes would not go through with the lease. May I ask you whether you told Mr. Cooke to tell Mr. Denson that?

A. I asked Charles—yes, I asked Charles, my son—shall I go ahead?

Q. Well, answer the question. A. Yes.

Q. How long before April 10, 1946, had you made up your mind that you wouldn't go through with the contract?

A. On April 10, 1946.

Q. That is that you made up your mind on that day? A. Definitely on that day.

(Testimony of Mrs. Chas. W. Mapes.)

Q. And you hadn't made up your mind before that?
A. No.

Q. Well, do you know why there was delay from April 10, 1946 to June 17, 1946 in offering to return the ten thousand dollars? [879]

A. Well, I believe it was offered once before, Mr. Platt.

Q. You believe it was offered once before?

A. To Mr. Denson's attorney in San Francisco. Mr. Young, I believe the name was.

Q. That is all hearsay on your part?

A. No, I know it was.

Q. Now you were there?

A. Well, I think Mr. Cooke has some correspondence to that effect.

Q. Well, there isn't anything in evidence to that effect, is there?

A. Not that I know. This is the first time it has been asked.

Q. But you are positive that there was no offer made, at least in Reno, for the return of that ten thousand dollars until June 17, 1946?

A. April 10th.

Q. Well, you don't mean to say, do you, Mrs. Mapes, that on April 10th, when you made up your mind you weren't going through with the contract, that this offer to return the check to Mr. Denson was made to anybody?
A. Yes.

Q. To whom?

A. To Mr. Denson, through Mr. Cooke. That would be hearsay, I didn't hear that one, no.

(Testimony of Mrs. Chas. W. Mapes.)

Q. Well, did Mr. Cooke tell you that on April 10th, when Mr. [880] Denson appeared in his office and Mr. Cooke told him that he was satisfied Mrs. Mapes would not go through with the contract or would not give a lease, that he told Mr. Denson then and offered to return the ten thousand dollars?

A. With interest.

Q. Did Mr. Cooke tell you that?

A. Well, I had informed Mr. Cooke that that was what I was willing to do and I understood he did do it.

Q. Did Mr. Cooke tell you that he made that offer? A. Yes.

Q. When did he tell you that?

A. Either that day or the next day.

Q. And where? A. In his office.

Q. Did he tell you to whom the offer was made?

A. To Mr. Denson.

Q. In person? A. In person.

Q. Do you know why it was that Mr. Cooke waited from April 10th to June 17, 1946 to make the offer to Mr. Denson's attorneys to return the check?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: Objection overruled.

A. Well, I think I said before, Mr. Platt, that there was an offer made to Mr. Young, Young & Rabinowitz, or something like [881] that. I have the envelope at home.

(Testimony of Mrs. Chas. W. Mapes.)

Q. I am afraid, Mrs. Mapes, you are not answering my question. I will ask the reporter to read it.

(Question read.)

A. Well, when you speak of Mr. Denson's attorneys, is that your firm, Mr. Platt?

Q. Yes.

A. I think I explained before that we offered it to another attorney. Now that date I haven't, but I think it would be very easy to check.

Q. In any event, that is hearsay on your part? You didn't make the offer?

A. No. I had my attorney make the offer.

Q. Did you ever tell Mr. Denson personally at any time that you would not go through with the contract and would not grant him a lease?

A. I told him no, that I wouldn't because the lease was supposed to have been with my son and he and my son refused to enter into the lease.

Q. May I again have the question read and if you don't understand it, tell me and I will try to make it clear.

(Question read.)

A. Yes.

Q. Where did you tell him that?

A. I told him through my attorney, Mr. Cooke.

Q. Well then are we to infer from that that you never told him personally that you wouldn't go

(Testimony of Mrs. Chas. W. Mapes.)

through with the lease or wouldn't grant a lease, but did tell him through your attorney?

A. I wouldn't grant him a lease——

Q. (Interrupting) Pardon?

A. I beg pardon. I told him through my attorney. That is the answer.

Q. Then personally you never told Mr. Denson personally, to his face, that you wouldn't go through with the contract and that you wouldn't grant him a lease?

A. No.

Q. In your direct examination, Mrs. Mapes, you made reference to a statement made, the statement that you were associated with a family of builders and contractors, and I think you stated your brother was a contractor?

A. Yes.

Q. Mr. Hart is his name?

A. Yes.

Q. And you also stated that Mr. Hart, your brother, had spent a great deal of time here in Reno during the construction of the hotel?

A. Yes.

Q. Did you ever discuss with your brother the contract that you had with Mr. Denson?

A. No. [883]

Q. Never did?

A. No.

Q. You are sure about that?

A. Yes.

Q. Do you know whether Mr. Denson met your brother here in Reno, Mr. Hart?

A. He was here in the living room that day, April 10th, in my home.

Q. Do you know whether Mr. Denson met your brother before that time in Reno?

A. Yes, they met in San Francisco.

(Testimony of Mrs. Chas. W. Mapes.)

Q. I mean in Reno. We will come to San Francisco later.

A. No, I think that was the first time, just that first of April.

Q. Do I understand you to say that your brother met Mr. Denson in Reno on April 1st?

A. No. When they were down—I think it is in the testimony, Mr. Platt, that they met in San Francisco. That is when they met for the first time.

Q. What I am talking about now——

A. (Interrupting) That would be the latter part of March or the first of April.

Q. Do you know whether Mr. Denson met your brother, Mr. Hart, here in Reno at any time?

A. Yes. [884]

Q. When? A. April 10th in my home.

Q. April 10th. Who were present at that meeting?

A. My brother, William S. Hart, Mr. Denson, my son Charles, and myself.

Q. That was after you determined to repudiate—excuse me, your Honor, for using that word—that was after you determined not to go through with the contract and not to give a lease?

A. No, that was before.

Q. Well, didn't I understand you to say, Mrs. Mapes, that you decided on April 1st, 1946, not to give a contract?

A. No, Mr. Platt, if I said that, I am sorry. I said April 10th. If I have given you that to think about, I am sorry, but it is April 10th.

(Testimony of Mrs. Chas. W. Mapes.)

Q. Well, possibly I misunderstood you, I don't know. I thought you said April 1st.

A. It was our idea to have Mr. Denson come here on April 10th to see if we could get together and smooth this out and it was after Mr. Denson told me that I begged him to take my son that to my notion I could see my son was right in the deal. That is what he told me then.

Q. Then as I understand your testimony as just given, right up to April 10th you were ready to get together with Mr. Denson—— [885]

A. (Interrupting) Yes.

Q. (continuing)—if you could agree on what had to be agreed upon?

A. Yes, if he and Charles would take the lease, I was ready to go ahead with the lease with my son and him.

Q. Do I understand further, or that I may not misunderstand you, that on April 10th you were ready to go through with the contract providing arrangements could be made satisfactorily between Mr. Denson and your son Charles? A. Yes.

Q. Now there is no question about that?

A. There isn't any question about April 10th. The first part of the morning of April 10th I had come into that meeting ready to go through with the contract with Mr. Denson and my son if they were together on it.

Q. I think you stated, Mrs. Mapes, that Mr. Denson had met your brother, Mr. Hart, in San Francisco? A. Yes.

(Testimony of Mrs. Chas. W. Mapes.)

Q. And you know that of your own knowledge?

A. Yes.

Q. Do you know when those meetings occurred?

A. I don't know only what they told me. That was before they returned home on that day.

Q. Well, again I don't want you to misunderstand me. Do you know that your brother met Mr. Denson in San Francisco of your [1886] own knowledge, or do you know it through hearsay?

A. I just know it through hearsay, what they told me.

Q. Were you or were you not in San Francisco at any time in the presence of your brother and Mr. Denson?

A. No.

Q. Who told you that your brother had met Mr. Denson in San Francisco?

A. My brother told me what he had done. It is more or less on a party scale. He was telling me, in fact, he put on a clever stunt of the Gay 90's he had seen down there.

Q. Did your brother also tell you that they met Mr. Denson at Mr. Moorehead's office on the first day of April in Oakland?

A. No, I don't know if my brother was there.

Q. Do you know whether he was or not?

A. No, I don't.

Q. Do you know whether he was in Reno on the first of April?

A. No, he was down in the city while my son was down there.

(Testimony of Mrs. Chas. W. Mapes.)

Q. You do know that Mr. Hart was in California and not in Reno on April 1, 1946?

A. Yes.

Q. Did either your brother or your son tell you that Mr. Hart was present when Miss Mason was present and they discussed the lay-out and fixtures that were to go into the hotel? A. No.

Q. They didn't tell you that? [887]

A. No, it wasn't discussed.

Q. You say you didn't know anything about it?

A. Know about what?

Q. About your brother being at that conference in Mr. Moorehead's office in Oakland, California on April 1, 1946? A. No, I didn't.

Q. Would you tell us, Mrs. Mapes, when your brother came to Reno, Nevada, when the hotel was in process of construction? A. In March.

Q. In March? A. Yes.

Q. 1946? A. 1946, yes.

Q. And I assume that you had the benefit of his counsel and advice during that period?

A. Yes.

Q. Do you know whether your brother had any knowledge of the agreement that had been entered into between you and Mr. Denson and your son?

A. No.

Q. Are you certain he had no knowledge of such an agreement?

A. I am certain he didn't have, as far as I am concerned, any knoweldge of the agreement.

(Testimony of Mrs. Chas. W. Mapes.)

Q. I understand from your testimony that if he had any knowledge you didn't convey that knowledge to him? [888]

A. Well, you ask me if I know if he had any knowledge. I never discussed it so I wouldn't know. I think that makes it clear, that I wouldn't know of his having any knowledge. Is that clear? I am sorry I can't be clearer.

Q. Yes, that is quite clear. That is, summing it all up, you never told your brother that you had this agreement or contract with Mr. Denson?

A. No.

Q. And you never discussed that with him?

A. No, I never discussed that with him.

Q. You are familiar, Mrs. Mapes, with the answer signed by your attorney to the amended complaint that is filed here? A. Yes.

Q. You are familiar with the contents?

A. Yes.

Q. Do you recall in that answer that there is a clause that on November 5, 1945, you conveyed a third interest in this hotel property to your daughter Gloria? A. Yes.

Q. Well it is a fact, isn't it, Mrs. Mapes, that you did not convey a third interest to your daughter Gloria, but you conveyed it to a partnership known as the Mapes Company and consisting of you, your son and your daughter?

A. No, I conveyed to my daughter and my son and myself. The company was never entered into it.

(Testimony of Mrs. Chas. W. Mapes.)

Q. Well instead of doing as the answer alleges, that you conveyed it to your daughter——

A. (Interrupting) Yes.

Q. (Continuing) ——you now say that you conveyed it to your daughter and your son and yourself?

A. Yes. We all had a third interest in it.

Q. And at the time of that conveyance this partnership existed, did it? A. Yes.

Q. And you have seen the exhibit in this case which shows a conveyance of the interest in this hotel property to a partnership made up of yourself, your daughter and your son?

Mr. Cooke: If you ask any questions about what the document shows, I think it should be submitted to the witness. It speaks for itself, what it consists of. Object to the question, not proper cross-examination.

The Court: Objection overruled.

Q. Did you at any time, Mrs. Mapes, convey to your daughter personally any part or portion of the property upon which this hotel is being built?

A. Yes.

Q. When?

A. Around November 5th or 6th.

Q. Well, I am afraid I will have to ask you to please bring in the deed of conveyance to your daughter personally, if there [890] is one.

A. Oh, personally, no. I have been telling here——possibly I am rattled—that I deeded this to my

(Testimony of Mrs. Chas. W. Mapes.)

daughter Gloria one-third, my son Charles one-third and to myself one-third. Now I am sorry I have not answered the thought correctly. Anything else personally I didn't deed. It is all in the one deed.

Q. Now on November 5th, or up to November 5, 1945, you and Mr. Denson and your son were getting along all right, weren't you? A. Yes.

Q. And that was a month after you had signed the contract of October 5, 1945? A. Yes.

Q. I am reminded that the date of this conveyance was November 6th instead of November 5th.

A. That is right. I didn't think we were just hanging people for a day or a week or a month.

Q. Well, you didn't tell Mr. Denson anything about this conveyance to the three of you, did you?

A. No.

Q. And so far as you know he had no knowledge of it until after this action was brought?

Mr. Cooke: Objected to as irrelevant and immaterial.

The Court: Objection overruled.

A. Well, really I don't know whether I had discussed it with him or did tell him or anything. It doesn't stand out in my mind at all. [891]

Q. Well, Mrs. Mapes, you just testified that you never told him or didn't tell him. Now did you or didn't you?

A. No, I don't recall telling him, no.

Q. You had no intention at that time, did you, of defeating Mr. Denson out of any rights that he

(Testimony of Mrs. Chas. W. Mapes.)

might have had in that agreement by making a conveyance of this property to the three of you?

A. No.

Q. It has been suggested, Mrs. Mapes, that you testified that the estimate of the sum of 800 thousand dollars as the cost of the building, as set out in the agreement, was only a rough estimate?

A. It was a rough estimate.

Q. At that time nobody knew exactly how much the building was going to cost? A. No.

Q. And the 800 thousand dollars was sort of an approximation of what it might cost?

A. Yes, a low approximation.

Q. And is that likewise true of the 150 thousand dollars set out in the contract for the furnishings?

A. I don't know anything about that furnishing business, that is, if that is supposed to be low, or approximate or what. It was Mr. Denson's idea.

Q. But at any rate that was only set out in the rough like the other part of the agreement? [892]

A. Mr. Denson's agreement, that was preliminary, yes.

Q. In any event, as stated in the agreement, it was a mere estimate? A. Yes.

Q. And you understood when you signed the agreement that the second parties, meaning Mr. Denson and your son, "will at their own costs provide and place in said structure such furniture, fixtures and equipment as shall be suitable and

(Testimony of Mrs. Chas. W. Mapes.)

proper and necessary to furnish and equip the same as a first-class hotel and apartment building''?

A. Yes.

Q. You understood fully that that was the obligation of both Mr. Denson and your son?

A. Yes.

Mr. Platt: I believe that is all.

Redirect Examination

By Mr. Cooke:

Q. In regard to the deed of November 6, 1945, which counsel asked you about, how long a time prior to November 6, 1945, did you have in contemplation the making of such a deed?

A. I would say for several years before.

Q. You understood that by that deed the property is transferred from you as an individual to yourself and Gloria and Charles W. Mapes, Jr., in joint tenancy?

A. Yes.

Q. You didn't give your attorney any instructions in regard to [893] having that deed prepared prior to the time it was prepared?

A. Oh yes, I spoke about it a long time before that to you, Mr. Cooke.

Q. You say a long time, does that go back a matter of months or weeks or what?

A. A year possibly, or better.

Q. With reference to your brother, Mr. Hart, you told us about the various trips he made out here and the time he spent here. Did he have any busi-

(Testimony of Mrs. Chas. W. Mapes.)

ness here—I am now speaking about business—other than to assist you in regard to the hotel?

A. No.

Q. He came here for social purposes too, I suppose, to a certain extent, is that right?

A. Yes, of course.

Q. You had a lot of business?

A. He came out to help us on his visit. We still need his help and we have to go on and have it more.

Q. You said something this morning he is on his way here now, is that right?

A. No, right after the holidays. He would have been here sooner if we wanted him.

Q. You told counsel something about you had not discussed the Denson matter with your brother. Does that mean that you never discussed it with him or it wasn't discussed until after April 10th?

A. I don't recall ever discussing it with him; in fact, I was rather surprised and shocked when I found him in our living room when I came in that morning.

Q. Who in the living room?

A. My brother in the living room with Mr. Denson and Charles. He didn't know anything about it, so far as I knew, and I was rather surprised to see him there.

Q. You answered one of counsel's questions in regard to Mr. Denson, what took place on April 10th, by saying in part, "I now see that my son was right." What do you mean by that?

(Testimony of Mrs. Chas. W. Mapes.)

A. When Charles told me how Mr. Denson had treated him when he asked to get together on this agreement to draw up this lease, I couldn't believe my son. I don't mean to say that I mistrusted him, but I said, "Charles, please don't get excited. Let's get together and discuss this," and he said, "Mother, he treated me like a regular child. I am not supposed to have anything to do with this hotel. He is to manage it and he also went out on his agreement of 30-70." Then when I met Mr. Denson for the first time in my home and he started to tell me that I had agreed to build him a hotel and that I had begged him to take my son Charles and for my sake he considered Charles, right there and then I was through. I could realize all I had heard my son say was true and that is what decided for me.

Q. That is what you mean when you said, "I saw that my son [895] was right"?

A. Yes.

Mr. Cooke: That is all.

Mr. Platt: That is all.

Mr. Cooke: Call Gloria Mapes.

GLORIA MAPES,

being first duly sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Your name is Gloria Mapes? A. Yes.

(Testimony of Gloria Mapes.)

Q. You are the daughter of Mrs. Charles W. Mapes? A. Yes.

Q. The sister of Charles W. Mapes, Jr.?

A. Yes sir.

Q. Do you know Mr. Denson, the plaintiff in this case? A. Yes.

Q. How and where did you first meet him, come to know who he was?

A. I met him, I believe, in the late spring of 1944?

Q. That was the first time? A. Yes sir.

Q. Down at the house? A. Yes.

Q. And after that meeting do you remember when you next met him, either there or anywhere else? [896]

A. I believe it was in the early fall, the same year.

Q. The same year, 1944? A. Yes.

Q. Where was that, down at the house?

A. Yes.

Q. When after that did you next meet him or know of his being at the house?

A. At the house?

Q. Yes, when did you know of him being at your home after that?

A. I didn't see him at home until the next year.

Q. Do you know what time it was the next year?

A. I believe it was in the fall.

Q. Well, with reference to the date September 23rd or 24th, would you say whether that was about the time?

(Testimony of Gloria Mapes.)

A. It could have been, I am not sure.

Q. You have no way of fixing it?

A. It isn't definite in my mind.

Q. To refresh your recollection, do you remember when he came down and stayed some two or three days at the house?

A. I believe that was the time he stayed at the house.

Q. And what were you doing at that time, Gloria; that is, were you attending school or what was your occupation?

A. I was in school at the time.

Q. And at that time did you participate in any of the discussions held between your mother and Mr. Denson and your brother [897] and Mr. Denson?

A. No.

Q. Did you overhear anything about the lease on the hotel?

A. No.

Q. Coming on down to November 6, 1945, do you remember of a deed being made by your mother to yourself and Charles and to your mother in joint tenancy? Do you remember about that?

A. Yes.

Q. At that time did you know anything about Mr. Denson and your brother Charles having some sort of arrangement or agreement of any kind on a lease on the hotel building?

A. No, I didn't.

Q. When, as nearly as you can recall, did you first learn that Mr. Denson claimed that there was an agreement for a lease or the like on the hotel building?

A. In the spring of this year.

(Testimony of Gloria Mapes.)

Q. You mean the spring of 1946? A. Yes.

Q. Do you recall anything about how you heard of it that first time? What made you learn of it or who did you hear talk about it?

A. My mother, I believe.

Q. At the house? A. At the house.

Q. That was the first time you knew anything about there was [898] any such claim existing as to the hotel property, is that right? A. Yes.

Mr. Cooke: That is all.

Cross-Examination

By Mr. Platt:

Q. Gloria, I understand you met Mr. Denson the first time in the late spring of 1944?

A. Yes.

Q. And then you met him in the fall of the same year and then you saw him the next year in September, 1945? A. Yes.

Q. And was Mr. Denson ever a house guest at your home? A. Yes, he was.

Q. Do you remember upon how many occasions?

A. At least a couple of times.

Q. Did you occasionally sit at the table with him and the other members of your family?

A. Yes, I did.

Q. Did you know why Mr. Denson was visiting with your family? A. Not exactly.

Q. Not exactly—do you know generally why he was visiting with the family?

(Testimony of Gloria Mapes.)

A. He was a house guest several times.

Q. Did you know why he was there?

A. No. [899]

Q. Did you ever hear that it was contemplated that he was going to run the hotel with your brother Charles?

A. No.

Q. Never heard that at all?

A. Not until I found out in the spring about it.

Q. Do you remember who introduced you to Mr. Denson?

A. Mother did.

Q. At the time of the introduction did she tell you who Mr. Denson was?

A. Not that I recall.

Q. During any of the time that you were in the presence of Mr. Denson, did you hear anything said about Mr. Denson and your brother going to manage the hotel?

A. No.

Q. You were in San Francisco, weren't you, Gloria, in August of 1945?

A. Yes.

Q. And you met Mr. Denson there, didn't you?

A. Yes sir.

Q. And your mother and Charles were there?

A. Yes sir.

Q. And do you know anything about an automobile trip around parts of San Francisco during which your mother was looking at apartment houses and hotels in San Francisco?

A. Yes. [900]

Q. Were you on the trip?

A. Yes I was.

Q. And Mr. Denson was on the trip?

A. Yes.

(Testimony of Gloria Mapes.)

Q. And Mr. Moorehead? A. Yes.

Q. Do you remember whether you saw Mr. Denson at any other time in San Francisco?

A. No, that was the only occasion.

Q. Gloria, I want to call your attention to these two newspaper articles that are in evidence here. For the purpose of the record I call them Plaintiff's Exhibit "I." I hand you a copy of the Nevada State Journal of December 2, 1945, with the proposed cut or picture of the hotel. Did you ever see that? A. Yes.

Q. Do you remember when you saw it?

A. I couldn't say exactly. I imagine it was around this date.

Q. You think it was about the time it was published? A. I believe so.

Q. Do you remember if you read it?

A. I read part of it.

Q. And the same with the Reno Evening Gazette, bearing date December 3, 1945, with a similar cut, likewise an article. Did you ever see that before? A. Yes. [901]

Q. Do you remember about when?

A. It must have been around the date.

Q. About the time it was published?

A. Yes.

Q. Do you remember reading any of that article?

A. Yes.

Mr. Platt: I think that is all, your Honor.

Mr. Cook: Call Mr. Denson as an adverse witness.

P. G. DENSON,

having been previously sworn, testified as an adverse witness called by the defendants, as follows:

Examination

By Mr. Cooke:

Q. I show you what purports to be an affidavit signed by you, Mr. Denson, dated July 19, 1946. Will you read that over and state if that is your affidavit signed by you?

A. That is my signature, yes.

Q. On page 5 of the affidavit, beginning with line 23, is this statement: This affiant became well acquainted with Gloria Mapes and affiant states the fact to be that said Gloria Mapes was thoroughly familiar with the fact that he was to manage and conduct said hotel along with her brother." Do you remember that statement?

A. I do.

Q. Is that true? [902]

A. That is true.

Q. Who was to manage it, you or you and Mr. Mapes together?

A. Let me bring that out a little more clearly.

Q. Answer the question if you will.

A. I was really to be the manager of it, but not from any publicity standpoint.

Q. That was agreed between you and Charles Mapes, was it?

A. It was just mutually agreed upon. There was nothing in the contract about it.

Q. That is agreement you had with him?

(Testimony of P. G. Denson.)

A. It was understood between him and I. In fact, he expected that.

Q. Where was the agreement discussed that way?

A. It was first discussed on the mezzanine floor in August of 1945 at the Sir Francis Drake Hotel.

Q. Who were present at that time?

A. Just Charles and myself.

Q. What was said upon that particular subject as to the management subject?

A. When Charles and I came down Charles wanted to chat with me in regard to our agreement between he and I so far as the deal was concerned. He said, "Mr. Denson," he said, "now we have never really spoken about how our agreement between you and I is to be, but," he said, "I want to be a 50-50 on this deal." And I told Charles, "That is all right, but there is [903] a little request that I would like to make of you Charles. Due to the fact that I have had many years of hotel experience, I would like to have the manager of operations." I said, "Not from a publicity standpoint and it doesn't need to be on our letterheads or our stationery." And Charles gave me the answer, "Well, Mr. Denson, I expected that."

Q. That was in regard to your statement that you were to be manager?

A. Yes, that was in reply to my request.

Q. What, if anything was said at that time as to what Charles would do?

(Testimony of P. G. Denson.)

A. Charles would take a part in the hotel, Mr. Cooke.

Q. What was said, Mr. Denson?

A. Well, I don't believe there was anything particularly said; so I think it was discussed between Charles and I that I didn't think it would take him very long to know and learn the hotel business and that I would coach him and assist him in every way that I could.

Q. While you were acting as manager—what I am trying to find out from you—what was Charles to do?

A. There would be plenty for him to do in a hotel, Mr. Cooke. He would be right along there the same as myself, so far as that goes, with the exception of making decisions in regard to personnel and actually deciding on who should be hired and discharged when anything like that came up. [904]

Q. If you were manager, he would be under you, would he not?

A. I wouldn't say Charles would be under me. I would never expect that of him at all and he wouldn't be treated as such. He would be treated just the same.

Q. What do the duties of a manager of a hotel consist of? A. It all depends what capacity.

Q. I mean such as the hotel we have in mind here?

A. I say this would be a first-class hotel, to be run on as high a plane as any hotel in the United

(Testimony of P. G. Denson.)

States. As a rule more or less there is managing director and resident manager, then first assistant and second assistant. Those are the titles they use.

Q. That is the set-up, but what I am trying to find out is the man who is supposed to be manager of that hotel and entrusted with the operation of it, what are his duties?

A. He is known as the managing director. In other words, he really has the final say in any discussion that comes up. He gets together with his resident manager and would probably call in their first assistant and go over those different things.

Q. Here you didn't have any of these other officers, just you and Charles?

A. Just Charles and I.

Q. You would be manager?

A. That is correct. [905]

Q. What would be your duties, so far as you can tell us, in the operation?

A. The operation of the hotel, would be manager of everything, every department, the various departments of the hotel; in fact, the entire crew, you might say, there would be under my jurisdiction and also Charles' too.

Q. Even though you were the manager?

A. That I believe I brought out pretty clear, Mr. Cooke, that I should have the right to decide certain things, as far as being the manager of operations. There must be one head, as a rule. Of course, there are others. I have had partners. I never had any trouble with them.

(Testimony of P. G. Denson.)

Q. What, for instance, would the things be, type of things would there be that would have to be passed upon by you as the manager?

A. Well, there might be certain employees there that were very efficient and very reliable. Your associate has equal rights with you so far as ownership of it is concerned. He might take a dislike to that particular party and say, "Well, you are fired." Well, I would like to have a little something to say in regard to that, also I would like to pass on it. There was no object in my being the manager of operations from any publicity standpoint at all. I don't intend it that way. Charles made the statement I wanted it on the stationery, which is one thing I told him it didn't have to be on the stationery, [906] just leave it out.

Q. You expected, in the event this deal went through as contemplated, that your entire time and efforts would be devoted to the job of running this hotel?

A. I intended to put all my time in it. That is why I disposed of my hotel. In operating a hotel, your Honor, all 24 hours you are on the job, whenever you are needed, but I always live on the hotel I operate.

Q. How old a man are you, Mr. Denson?

A. Is that necessary? Am I compelled to answer that?

Q. I would like to have an answer to that.

A. I don't think that has anything to do with this. I haven't asked you your age. I don't think

(Testimony of P. G. Denson.)

it has anything to do with this at all, Mr. Cooke.
I have always kept my age to myself.

Mr. Platt: I think it is immaterial.

The Court: What is the materiality?

Mr. Cooke: In connection with the testimony of Charles Mapes, he said he was an older man than he.

A. I am old enough to be his father.

Mr. Platt: I admit that.

The Court: As far as that is concerned, Mr. Platt admits he is considerably older than Mr. Mapes.

Mr. Cooke: That doesn't satisfy the law.

The Court: Well, answer the question.

A. I was born in 1883. [907]

Q. All right, figure it out. A. 63.

Mr. Cooke: That is all.

Mr. Platt: No questions, your Honor.

CHARLES W. MAPES, JR.,

one of the defendants, having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Were you in San Francisco on any occasion when your uncle, Mr. Hart, met Mr. Denson there?

A. Yes.

Q. What occasion was that, what date?

A. Around April 1st.

Q. 1946? A. 1946.

(Testimony of Charles W. Mapes, Jr.)

Q. That was at the time Miss Mason was up there with some plans, etc.?

A. That was the trip, yes.

Q. You have heard your mother's testimony in regard to the capacity of the garage and I think you gave some testimony when you were on the stand before. Do you remember that?

A. It was contemplated its capacity would be around 70 cars.

Q. It was contemplated, but is the building far enough progressed now so you can state what it will actually be?

A. 70 cars, is as near as I can give.

Q. What would you say from all you know about the prospects [908] of the hotel and its future whether that will be big enough to accommodate the guests?

A. It is too small. It couldn't accommodate all our guests.

Q. Has it been the contemplation to put in oil service and other equipment for handling of cars in the basement?

A. If it were necessary.

Q. Well, do you know whether it is necessary or not?

A. Well, I would think it would be necessary, yes.

Q. Have you given the subject any thought as to the amount that would be required for payment of taxes on the building and for its upkeep, fire insurance and the like of that?

A. I have given it some thought, yes.

(Testimony of Charles W. Mapes, Jr.)

Q. Have you ascertained from any investigation you have made on the subject as to what amount of taxes would be, approximately what they would be per year? A. Yes, I have.

Q. What is the amount?

A. I have to have a piece of paper. I would say roughly around 30 or 35 thousand dollars.

Q. Per annum?

A. That is rough, of course.

Q. I understand, that is your estimate, the best you can make? A. Yes.

Q. Thirty to thirty-five thousand per year?

A. Yes sir. [909]

Q. Let me ask you this. You are the manager of the Mapes Company and Mapes interests for the construction of the hotel, are you not?

A. I am the contractor and manager of the Mapes Hotel Construction Company.

Q. And you have been since the hotel started?

A. Since the permit for the building was taken out in January, yes.

Q. Have you familiarized yourself with the cost and details of the building, the upkeep, fire insurance, and subjects of that sort?

A. Yes, I have.

Q. What have you allocated, if any sum, for the cost of fire insurance on the building per year?

A. About six or seven thousand dollars a year roughly. All those figures are rough.

Q. I understand this is an estimate. Six or seven thousand per year? A. Yes.

(Testimony of Charles W. Mapes, Jr.)

Q. That is for fire insurance. And have you considered the matter of cost of upkeep of the property and the building?

A. I would say around 15 thousand dollars.

Q. These are all figures based upon the year, are they not?

A. That is per year, yes. That is a rough figure.

Q. Your mother gave some totals in her testimony this morning [910] as to the amount of money that was borrowed to build the hotel and the amount of money that the Mapes family have contributed in addition and her estimate as to the value of the lot. Did you hear her testimony?

A. Yes, I did.

Q. Without repeating and going all over again, what would you say as to whether these figures on that were correct or not?

A. As near as I can say they were correct.

Q. As estimates to some extent?

A. As to estimates. Some are exact.

Q. The amount of money borrowed, that is an exact figure? A. Yes, sir.

Q. The value of the lot is a matter of opinion or belief? A. That is reasonable.

Q. Three hundred thousand?

A. That is reasonable, yes.

Q. Did you hear your mother's testimony she had been offered more than that? A. Yes.

Q. Do you know anything about whether that is so or not? A. Yes.

(Testimony of Charles W. Mapes, Jr.)

Q. That is a fact? A. Yes.

Q. That was before the building was commenced to be constructed on it, is that right? [911]

A. Quite a few years prior to that, yes.

Q. Since April 10, 1946, what, if anything, has been done by you by way of arranging for furnishings and equipment for the hotel?

A. I have not done anything prior to that date. Was it after——

Q. Yes, I asked you after that date what, if anything, has been done?

A. I have contacted the various furnishings firms and negotiated to get furniture for the hotel.

Q. Have any shipments been made pursuant to your efforts?

A. No shipments have been made as yet.

Q. Commitments have been made?

A. Yes.

Q. Your mother gave in an estimate this morning, I think, as to the cost of equipping the hotel with necessary furniture and furnishings suitable for that type of building. Did you hear that testimony? A. Yes.

Q. I think it was 450 thousand.

A. As I recall, I believe mother said around 400 thousand or more.

Q. How does that correspond with your idea about it?

A. I would say 400 thousand or thereabouts, possibly a little more.

(Testimony of Charles W. Mapes, Jr.)

Q. In regard to these plans, lay-outs and sketches, etc., [912] that Mr. Denson has told us about, did you see any of them outside of those that were submitted by Miss Mason on behalf of Barker Bros.?

A. No, only the one of Barker Bros.

Q. That is the only one? A. That is all.

Q. Did Mr. Denson ever discuss any of these others with you, state he would get them or that he had gotten them or the like?

A. No, other than Barker Bros. I didn't know what Mr. Denson was *going* with any of the furnishings.

Q. How did you learn about Barker Bros? Did he tell you or did you know it by Miss Mason coming up to the meeting?

A. He called me four or five days prior to the meeting and wanted me to come to Los Angeles to meet with the interior decorator of Barker Bros. I told him I couldn't go to Los Angeles and I called him once or twice after that and told him I would have to meet him in San Francisco. I met the decorator from Barker Bros. around April 1st.

Q. You learned of Barker Bros. etc. from Mr. Denson before you went to San Francisco, that is right?

A. He mentioned Barker Bros. before. That was only four or five days before the meeting on April 1st. That was my first knowledge of that.

Q. And when he mentioned it to you in that way, that was the first knowledge you had? [913]

(Testimony of Charles W. Mapes, Jr.)

A. The first that I recall, yes.

Q. The first knowledge of Barker Bros. furnishing the plans?

A. That is my recollection, yes.

Q. With reference to the talk on April 1, 1946, with Mr. Denson about the sky room, did you hear his testimony?

A. Yes, I did.

Q. Have you anything to say by way of explanation?

A. Is this the meeting Mr. Denson and I had alone in the room at the Sir Francis Drake?

Q. When you discussed the sky room. I think he testified to the effect that that was the only point that was discussed, the only point of difference was the sky room.

A. I don't recall any.

Q. Well, did you discuss the sky room at this April 1, 1946 meeting with Mr. Denson?

A. Yes.

Q. Where?

A. At this room at the Sir Francis Drake.

Q. What was said in regard to it?

A. I told Mr. Denson I was very disappointed with the ideas he had given Barker Bros. on the sky room. He had shown on his plans a laundry where it spoiled our view along the river and also he put in the sky room a band stand which practically broke up the entire view of one side of the sky room, and I told him I thought it was very foolish that he would spend [914] any time and waste my

(Testimony of Charles W. Mapes, Jr.)

time on such plans, in view of the fact that my mother had increased the sky room and gone to considerable expense to make the room and view as beautiful as possible, that he had included the laundry along the river, where we have one of the finest views, the most expensive parts of the building. He didn't like it at all and I didn't like it.

Q. You say he didn't like it, what do you mean?

A. He mentioned something about he didn't want any damn kid to tell him anything about the hotel.

Q. Did he use those words, "damn kid"?

A. Well, he may not have used that, but the substance is that. He didn't want any kid telling him about the hotel.

Q. Referring to you?

A. Referring to me.

Q. This plan that you had which you discussed with him in regard to the sky room, etc., that you just testified to, was or was that not finally adopted?

A. What plan, Barker Bros.?

Q. Oh no, the plan you had for the sky room that you were discussing with him?

A. I wasn't discussing any plan with him. The only plans I discussed with him were the plans he submitted from Barker Bros.

Q. What I mean is your objections to the plans, were they afterwards incorporated in the building? Was the building according to your objections or not?

(Testimony of Charles W. Mapes, Jr.)

A. Well, none of the ideas incorporated in Barker Bros. plans were ever adopted in the building. There were so many objections to them—Mr. Slocum, Mr. Moorehead and myself; in fact, everybody who had any connection with the building objected to practically all the plans that Barker Bros. incorporated.

Q. Was the sky room finally finished, as far as it is finished, in the way that you argued with Mr. Denson that it should be? Can you tell us?

A. Yes, we have taken advantage of every view for the sky room. That is the idea of the sky room, to get a view, not to have a laundry to block out the view; and have the grand stand to block out the total side, we certainly don't have that in our present plans.

Q. That is the way you discussed it with him?

A. That is right.

Q. When he said that he didn't want any damn kid, or any kid, telling him how to run a hotel—

Mr. Platt (Interrupting): Just a minute. First the witness testified he said "damn kid" and then he says he doesn't know whether he said "damn" or not. I think before counsel attempts to put any words in the witness' mouth he had better have that cleared up.

The Court: I think the witness cleared it up. He didn't say "damn kid", he said something to the same effect, but he didn't use the word "damn."

A. I wouldn't say definitely he used that.

(Testimony of Charles W. Mapes, Jr.)

Q. Whatever it was, he made that statement, what did you say?

A. I told him that I didn't like the idea he had incorporated in the sky room, that I thought he was taking it very lightly; we had gone to considerable expense to raise the ceiling on the sky room and bring the sky room out flush with our typical room. That I didn't like the ideas and I thought the whole idea of Miss Mason up here was a waste of time.

Q. What did he say to that, if anything?

A. I don't recall. He resented me saying it, saying he wasn't going to have any kid tell him how to run a hotel. I don't know what he said other than that, I can't recall now.

Q. How old are you, Charles?

A. Twenty-six.

Q. Have you had any connection, any experience in this class of work outside of this particular hotel?

A. I have not had any hotel experience, no.

Q. I mean in constructing buildings?

A. Yes, I have dealt with the family on property we own in Reno.

Q. The family owns considerable property in Reno, does it not?

A. Yes.

Q. And it has been part of your duty and job to look after that? [917]

A. Yes.

Q. Is there any construction in connection with that?

A. There has been on several occasions, yes.

(Testimony of Charles W. Mapes, Jr.)

Q. Did you have anything to do with the job, with the work, construction, I mean?

A. Yes, I did, along with my mother.

Q. When did you first begin taking active practical interest in the construction of this hotel?

A. From the very start.

Q. Well, what I am trying to get at is was the matter discussed in your family for any considerable length of time before actual work began?

A. Do you mean actual work in the construction of the building?

Q. No, I am asking whether you discussed the matter of this hotel, how many stories it was to be and what type of construction it was to be, etc., prior to its construction? When did that first come up? Do you understand what I mean?

A. It came up some time in the fall of 1945 before we ever had any agreement with Mr. Denson.

Q. When was it talked of that your family would build this hotel first, as far as you know?

A. It has been talked about, building a hotel, ever since my father bought the property.

Q. And that goes back a matter of ten years or more? [918]

A. 1937.

Q. What I am trying to find out is, Mr. Mapes, the general subject matter of this hotel was discussed pro and con in the family there. In connection with that, did you learn anything about building of hotels and general subject matter of hotel operations?

(Testimony of Charles W. Mapes, Jr.)

A. It wasn't entirely foreign to me in that the subject had been discussed several times at the house and we have friends in the hotel business and occasionally they gave us help and information, so I wouldn't say I am a stranger to it. I was gradually working into it. A lot of that information I have used since.

The Court: We might take our recess at this time before we go to a new subject.

(Short recess.)

Mr. Mapes resumes the witness stand on further examination by Mr. Cooke.

Q. Since you assumed the management of construction, state what the fact is as to whether you have given your entire time as to that work and business?

A. Yes, practically my entire time.

Q. Have you any other business or occupation?

A. Other than family business, no, the hotel has occupied all of my time.

Q. Where did you go to school, Mr. Mapes?

A. University of Nevada and Harvard Business School.

Q. Did you graduate from the University of Nevada? A. Yes, I did.

Q. What did you major in?

A. Economics and business administration.

Q. Did that include the subject of accountancy?

A. Yes.

(Testimony of Charles W. Mapes, Jr.)

Q. And you attended Harvard University too?

A. Harvard Business School.

Q. That is a preparatory school for draftees, or at least persons who were going into the navy?

A. The Harvard Business School course was given to all officers going into the Supply Corps of the United States navy, accountancy, purchasing supplies and business matters.

Q. How long did you attend that?

A. It is a year and a half course and I went five months.

Q. Did you get any certificate at the completion of your course there from that institution?

A. Yes, I did.

Q. And you did complete the course?

A. I completed it.

Q. You told us you were in the navy. What particular type of work did you do in the navy?

A. I was a supply officer. I had charge of pay-rolls, paying the personnel on the base of the squadron. The particular [920] unit I was attached to did the purchasing of supplies.

Q. Did that involve substantial sums of money and property under your charge?

A. Very substantial. I would say it ran into millions of dollars.

Q. What part of the territory did you cover?

A. All of the Pacific Coast, all of Alaska, all of the Aleutians, part of the Islands in the Pacific.

Q. What particular title, if any, did you have?

A. Supply officer, Navy Air Transport Service.

(Testimony of Charles W. Mapes, Jr.)

I was attached to various supply services. Most of my naval service was with the transport service.

Q. Did the course you told us you received and the experience you had with the navy assist you to any extent in your work in connection with the construction and furnishing, etc. of the Mapes Hotel?

A. It gave me a very fair understanding of how to handle books and to purchase material.

Q. As supply officer of the navy, was that part of your job there, to purchase material?

A. Absolutely. That was my whole job, to pay the men and to purchase all supplies needed.

Q. And that ran into the millions, I think you told us?

A. Yes, that included aircraft and food, clothing, practically everything; furniture, just about everything you can [921] name.

Mr. Cooke: I think that is all.

Cross-Examination

By Mr. Platt:

Q. Mr. Mapes, during all of the negotiations, beginning in 1944 and continuing up to the execution of the contract in evidence here, Mr. Denson was available to you at almost any time?

A. No, there was a long period of time when I didn't know Mr. Denson's address. After he sold his hotel in Visalia, Mr. Denson went on what you might call a vacation and rest; for a long period of time there I didn't know where he was staying.

Q. Well, after the execution of this contract on October 4, 1945, you knew that Mr. Denson was a

(Testimony of Charles W. Mapes, Jr.)

resident of California and spent most of his time in California?

A. Yes, I knew he was a resident of California.

Q. And during all that time you were in California and in San Francisco and Oakland and never left the country during the war, did you?

A. I did. I had out of States service, yes, in the navy.

Q. How long a period of time?

A. For over a year.

Q. Where did you go?

A. The Aleutians.

Q. And when did you return from the Aleutians?

A. This was all prior, before I think I even met Mr. Denson. I don't think this is all necessary. What is it going to show?

Q. Well, when did you first meet Mr. Denson?

A. I think it was some time in September, the early fall of 1944.

Q. Well, since early September, 1944, you were constantly in the State of California, weren't you?

A. I wasn't constantly, no. I made trips to Reno and made trips to Seattle. My job was in a squadron that operated all over the Pacific, Mr. Platt, and we had no permanent base. Our job was to carry supplies and mail.

Q. Where were your headquarters?

A. I was based at the Oakland Airport, Oakland, California.

Q. Your headquarters were Oakland, California?

(Testimony of Charles W. Mapes, Jr.)

A. Yes. I got out of the navy shortly after that.

Q. You knew all the time, didn't you, that Mr. Denson was a resident of the State of California?

A. I knew he lived in California, yes.

Q. And that he actually lived there?

A. Yes.

Q. And during some of the period that you were in the service you made week-end trips to Reno, didn't you? A. Yes.

Q. And those week-end trips occurred in 1945, didn't they? [923] A. Yes.

Q. And prior to and up to and later than October 4, 1945 when this contract was executed?

A. I made trips to Reno after that, yes.

Q. Well, you almost made weekly trips, didn't you?

A. No, I made two trips. I made one trip around September 22nd and 23rd, was on a 71-hour pass, and another one on October 4th. Shortly after I was on terminal leave, getting out of the navy.

Q. And then you were in Reno most of the time?

A. Yes.

Q. And as I understand it, up to April 1, 1946, you and Mr. Denson got along all right?

A. We didn't have any hard feelings, no. We were still trying to get together.

Q. You have just testified here, Mr. Mapes, about estimates that you have made of taxes, insurance and upkeep. Have you made any investigation as to the amount of interest that would be due on the borrowed money? A. Yes.

(Testimony of Charles W. Mapes, Jr.)

Q. What do you estimate that to be?

A. That would be around 48 thousand dollars.

Q. A year?

A. Yes. You are talking about the building as it is now?

Q. Yes, I am talking about the loan that was made for the [924] construction of the building. And who had that loan?

A. Is that absolutely necessary?

Mr. Platt: Well, I submit, your Honor, that Mr. Denson is obligated to guarantee the interest on the loan and I think he is entitled to know something about the loan.

The Court: Objection overruled, if there was one. I have not heard one yet. You may answer the question.

A. It is not the company that Mr. Denson claims that we got the loan from.

Q. Will the reporter kindly read the question?
(Question read.)

A. Do I have to answer that, your Honor?

The Court: Yes.

A. Jefferson Standard Life Insurance Company.

Q. Now, Mr. Mapes, when you entered into this agreement and signed it, you were familiar with paragraph 9 of it, weren't you, which reads as follows: "The second parties (which means you and Mr. Denson) as a part of said lease will guarantee the said first party (which means your mother) that the total annual income from the entire build-

(Testimony of Charles W. Mapes, Jr.)

ing, which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money and to amortize the cost of said building within said lease period." You understand [925] that section, don't you, didn't you, of the agreement when you signed it?

A. That is part of the agreement, yes.

Q. You recognize from that section of the agreement, don't you, that no matter what the taxes are or will be, or the insurance is or will be, or the upkeep is or may be, or what the interest on borrowed money may be, that Mr. Denson is obligated, as well as you, to guarantee that payment to your mother, Mrs. Mapes?

Mr. Cooke: We object to that, asking for witness' construction of the agreement. The agreement can speak for itself.

The Court: Objection overruled. Answer the question.

A. Well, that is what it says there.

Q. That is what it says?

A. I can't interpret it. I am not a lawyer.

Q. Well, you understood it when you signed it?

A. Yes, I did, with the understanding that Mr. Denson and I would always deal right with mother. That was part of the agreement that I signed, yes.

Q. Well, let me ask you again, did you understand section 9 of this agreement when you signed the agreement? A. I believe I did.

Q. Now you have testified, Mr. Mapes, to a con-

(Testimony of Charles W. Mapes, Jr.)

versation that [926] you had with Mr. Denson at the Sir Francis Drake Hotel on April 1, 1946, in Mr. Denson's room. I asked you that same question when you were on the stand before, as to your conversation with Mr. Denson at that time. I have a transcript of your testimony before me and your answer, and why is it in your answer, in response to my question, "What was discussed there?", why was it when you were on the witness stand before you didn't testify that Mr. Denson called you a damn kid, or in substance something to that effect? I show you the question and I show you the answer.

A. What question are you referring to here? Will you point it out?

Q. I am sorry. The question beginning at line 16: "Was there anybody else there beside you and Mr. Denson?" The next question is "What was discussed?"

A. I don't know why unless you cut me off and asked me another question. That is actually what happened there.

Q. Why didn't you also testify, when I asked you this question, as a part of the discussion, that the question of the laundry room in the sky room was discussed?

A. I don't think you asked me any question to bring the answer out.

Q. I asked you what was discussed there, didn't I? A. Discussed where?

Q. At the interview that you had with Mr. Denson in Mr. [927] Denson's room at the Sir Francis Drake Hotel on April 1, 1946.

(Testimony of Charles W. Mapes, Jr.)

A. You asked me and I answered it. I may not have given you all the conversation.

Q. But you note from an examination of the answer that you gave on yesterday, I think it was, when I interrogated you, that you made——

Mr. Cooke: (Interrupting) Wasn't here yesterday.

Q. (Continuing)—that you made no reference to the laundry matter and made no reference to the fact that Mr. Denson called you a damn kid or something to that effect.

A. I think I corrected my statement. I didn't say that necessarily Mr. Denson called me a damn kid, but he implied a kid in the conversation. I thought I had corrected that previously.

Mr. Platt: May Mr. Sinai interrogate the witness in respect to these plans, your Honor?

The Court: Yes.

Examination

By Mr. Sinai:

Q. Mr. Mapes, you have testified that Mr. Denson showed you the drawings from Barker Bros. and that there was indicated thereon a laundry in the sky room, that is your testimony, is it not?

A. Well, that is the substance of it. He wanted the laundry up there.

Q. Well, wasn't your testimony to the effect that he showed [928] you plans of Barker Bros. and that the plan indicated a laundry and that you objected to that because it shut off the view?

(Testimony of Charles W. Mapes, Jr.)

A. He had a laundry in the sky room. If he did not have it, he was going to put one there.

Q. And when you testified as to the laundry, did you have the plans before you at the time you and Mr. Denson discussed the sky room and the furnishing of it? A. I haven't seen those plans.

Q. I show you here a plan and the notation thereon is: "Sky room, Hotel for Charles W. Mapes Company, as suggested Barker Bros." That is Plaintiff's Exhibit No. G-1. I ask you if there is indicated thereon anything by way of a laundry?

A. That is not a complete plan of the sky room. The sky room is extended on here and it was this space, if I recall, Mr. Denson wanted to put the laundry. This is the river, this is Virginia Street, this is along the river, this back portion that was added on.

Q. Then I understand the plan of Barker Bros. doesn't show the laundry?

A. Well now I think there is another plan.

Q. I show you here another plan, which is also part of Plaintiff's Exhibit G-1, also prepared by Barker Bros., and ask you if that is the plan which has notation: "Proposed lay-out, top floor, dining room C. W. Mapes Hotel, Reno, Nevada", [929] and ask you if this plan was also shown to you by Mr. Denson?

A. I assume it was, but there is still another plan of the sky room. You haven't shown me the right one yet.

(Testimony of Charles W. Mapes, Jr.)

Q. Is there anything on either of these plans of the sky room or top floor of Barker Bros. which indicates the laundry?

A. There is nothing. This is only a portion. This isn't the whole sky room. It doesn't even show the steps.

Q. Isn't it a fact that subsequently the sky room was extended, which will not show on Barker Bros. plan, on either of these plans?

A. If I recall—if you show me the right plan of Barker Bros. I can show you what I mean. There is some other plan. I believe it was colored. These were not the only other plans.

Q. Are there other plans of Barker Bros.?

Mr. Denson: Yes, there are quite a number of them but there is no place on any other where such a thing as a laundry proposed in the sky room.

Mr. Cooke: I move to strike that out.

The Court: It may go out.

Q. Mr. Mapes, I show you another plan of the sky room from Barker Bros. and which is also part of Plaintiff's Exhibit G-1, and ask you if there is anything on this third plan which indicates a laundry?

A. This is only a part plan. There is no laundry on there. [930] This is the plan I had reference to. This is along the river. This is Virginia Street. It is this section back here on this plan that showed a bakery, kitchen storage, linen storage, men and women's rest rooms, which takes up half

(Testimony of Charles W. Mapes, Jr.)

the area of the sky room along the river side, takes up the whole back portion. The recommendation was made at the meeting that a laundry be put up there. However, I recall now that I objected to this plan because, as you can see yourself, Mr. Sinai, this is the river, half of our view along the river is taken up by rest rooms, by bakery, by linen storage, by kitchen storage. The ceiling is 16 feet high, we have double pane glass and the view is entirely lost. It is an absolute waste, as far as getting anything out of it for any beauty standard and was the contention of Mr. Moorehead and Mr. Slocum and all my engineers that all this kitchen storage and bakery equipment should be down in the basement, which is customary, I think, in almost any hotel, rather than have it put on top of the hotel.

Q. Wasn't it also Mr. Denson's objection—didn't Mr. Denson advise you that this was Barker Bros. idea and that he did not propose to have this, the kitchen storage or bakery or anything else and in fact recommended it be a clear opening for the view?

A. He did not. As I understand it, this was his suggestion to Barker Bros. Mr. Denson testified he worked with Barker [931] Bros. and I assumed at that time it was his idea that he gave to Barker Bros.

Q. A plan subsequently was adopted, was it not, in respect to the sky room? A. A plan?

Q. Yes.

(Testimony of Charles W. Mapes, Jr.)

A. We have a plan now, yes.

Q. When did you have your ideas finally crystallized into a plan for the sky room, what date?

A. Well now, when you ask me about a plan, there are several plans of building—there is material plan, there is structure plan. At that time we had structure plan of the sky room. I mean we knew where the columns were, how high the ceiling was going to be; in other words, knew how much space we had to work in.

Q. When did you finally determine on the layout of the sky room of a definite nature so that you would have this view you are talking about?

A. I can't give you any definite date except I know the sky room is fixed—on April 1st—I know we haven't done any changes on the structure part of the sky room since.

Q. How long prior to that did you determine that you wanted a clear span and not have any storage rooms or laundry, as you say, or anything else?

A. That was our intention right from the start, Mr. Sinai. [932]

Q. You told Mr. Denson that?

A. I told him that, yes.

Q. When did you tell him that?

A. I told him that in his room at the Sir Francis Drake. I didn't want to embarrass him in the presence of Miss Mason and everybody because my engineers were very mad about that, that he would destroy the most beautiful part of our room with bakery, laundry and kitchen.

(Testimony of Charles W. Mapes, Jr.)

Q. So far as Mr. Denson was concerned, that was satisfactory, was it not?

Mr. Cooke: What was satisfactory?

Q. To make the changes Mr. Mapes is referring to.

A. I don't know whether it was satisfactory or not. I didn't pay much attention because as I said, I was pretty disappointed that he would recommend such a lay-out.

Q. And from that time on he raised no objections to the changes that you suggested on April 1st?

A. We didn't have any more suggestions, Mr. Denson and I. It was left rather unhappily. I asked Mr. Denson to come to Reno and in about ten days' time he did come up and then after that I had no dealings with Mr. Denson on the hotel.

Q. In respect to the Jefferson Standard Life Insurance Company loan, have you committed yourself for any loans to any other company in addition to the Jefferson Standard Life Insurance Company? [933]

Mr. Cooke: Objected to as irrelevant and immaterial.

Mr. Sinai: We submit it is proper for the same reason given by Mr. Platt.

The Court: Objection will be overruled. I was just wondering if you should continue or not the examination on that point.

Mr. Sinai: Possibly I should not, your Honor.

The Court: Maybe one of you——

(Testimony of Charles W. Mapes, Jr.)

Mr. Sinai: I would prefer to have Mr. Platt interrogate.

(Examination continued by Mr. Platt.)

Q. Before I go on to another subject, Mr. Mapes, I will ask you if in addition to the life insurance company loan about which you have been interrogated and about which you testified, there was any other loan upon the building which involves, according to the agreement, the payment of interest thereon by you and Mr. Denson?

Mr. Cooke: Same objection.

The Court: Objection overruled. You may answer the question.

A. There is no other loan.

Q. Mr. Mapes, have you ever taken a course in engineering? A. No sir.

Q. Have you ever taken a course in architecture?

A. No sir. [934]

Q. Have you ever taken a course in building construction?

A. I have had manual training, things of that nature, which were required in school.

Q. Have you ever taken a technical course at any school or university or institution of learning?

A. No.

Q. Involving architecture, building construction, engineering, or kindred studies relating to the construction of buildings?

A. No technical studies, no.

Q. Have you ever taken a course in drafting?

(Testimony of Charles W. Mapes, Jr.)

A. I have had mechanical engineering, which is based on drafting.

Q. Have you ever actively participated in the management of a hotel so called?

A. I think I testified previously I have taken an active part in the Mapes Building.

Q. And you also testified that the Mapes building was——

A. (Interrupting) 100 rooms.

Q. 100 rooms, and let me ask you with respect to that, those rooms were practically filled, and always have been, with permanent guests, have they not?

A. Not necessarily, no sir. We have transient guests there.

Q. Is there any food supplied to those people?

A. There is no food, no.

Q. Any elevator Service? [935]

A. No elevator service.

Q. Is it fair to call it a rooming place?

A. There are apartments and rooms there. It is not a rooming house, not, it is above that type.

Q. Well, in any event, that represents the extent of your so-called hotel experience?

A. I have contacted Forwich & Forwich, who were the hotel accountants, the peer accountants in this country. I have their books, I have their information, I have been studying them. I know their food costs, their liquor control, their room schedules, and I have received considerable information from them. They are a firm that represents

(Testimony of Charles W. Mapes, Jr.)

100 or 200 hotels, nation-wide, do all the accounting for the hotel business and actually what they did is to boil down the information that governed things to operate a hotel.

Q. But as a matter of practical experience, you have not operated any hotel, or assisted in the operation of any hotel, save and except the so-called Mapes Building hotel, which you characterize an apartment house and which I characterize as a rooming house? You have had no experience whatever outside of that? A. No.

Q. As a matter of fact, Mr. Mapes, those rooms which you describe, the 100 rooms, are immediately over the Woolworth Building, aren't they, on Virginia street? [936]

A. You know where they are, Mr. Platt.

The Court: What is the answer?

A. Yes, they are.

Q. There isn't any lobby entrance to the rooms?

A. There is an entrance on Virginia street.

Q. On Virginia street? A. Yes sir.

Q. That entrance is a stairway?

A. Yes sir.

Q. And it goes up into the rooming section?

A. Yes, the stairway goes up.

Q. Is there any office connected with it?

A. We have an office there, yes, have a manager.

Q. And you have not conducted the office personally?

A. I do not live there. We have a manager there full time, yes.

(Testimony of Charles W. Mapes, Jr.)

Q. Then the management of the rooming house or apartments, whatever it may be described as, is under somebody under your supervision?

A. It is under mother's and my supervision. They act under our orders, yes.

Q. But the active work of management is designated to somebody who represents you?

A. Well, the management only consists of somebody being there, if a person wants a room or in case there is any trouble. I [937] mean the actual business of it is from the family.

Q. And in addition to these rooms you describe, there are offices, aren't there?

A. There are offices, yes.

Mr. Platt: That is all for the present.

Mr. Cooke: Some four or five questions back counsel stated he characterized this building as a rooming house. I move to strike that.

The Court: Motion denied. Anything further of this witness?

Redirect Examination

By Mr. Cooke:

Q. Counsel asked you a number of questions as to whether Mr. Denson was available during the period from September 24, 1945, on down to say April, 1946. I would like to ask you if you were available to him at any of that time for the purpose of meeting and discussions about your proposed agreement?

A. Yes, Mr. Denson at the entire time knows my address has always been 509 Ralston street, Reno, Nevada, for 26 years, over 20 years.

(Testimony of Charles W. Mapes, Jr.)

Q. You have told us you were in the Navy and you returned here for weekends at various times during that period, is that right?

A. I think I was available from October 15th or thereabouts, from October 15, 1945, on to the present date. [938]

Q. And in regard to your mother being available to him for the purpose of having a meeting, what do you know about that?

A. Mother was here the whole time, at our home.

Q. In any of the discussions that you had with Mr. Denson about your business relations, was the matter of the store rentals discussed, the amount of the store rentals?

A. No.

Q. Was the matter of how they were to be fixed, who was to have the say-so about fixing them, discussed?

Mr. Platt: What do you mean by store rentals, Mr. Cooke? These two people are not renting the stores, they are only renting the hotel. I do not understand the question.

Mr. Cooke: The agreement provides that——

The Court: There is nothing before the Court.

Mr. Platt: Well, I ask Mr. Cooke to clarify his question. I don't understand it.

The Court: Mr. Cooke, will you clarify that question?

Mr. Cooke: Well, the purpose of the question is to ascertain whether the amount of store rentals were discussed, those rentals from the stores that are to be included in this agreement, merged in the contract.

(Testimony of Charles W. Mapes, Jr.)

Mr. Platt: Oh, if he limits it to that, I have no objection.

(Question read.)

The Court: Do you want to reframe your question? [939]

Q. I am asking if any discussion was had with Mr. Denson in regard to who should fix those store rentals?

A. No, I do not recall that anything was discussed with Mr. Denson.

Q. You do not recall any discussion between you and Mr. Denson? Did you ever hear the subject discussed between your mother and Mr. Denson as to who should fix the amount of store rentals and how to rent the stores?

A. I have not, no.

Mr. Cooke: That is all.

Mr. Platt: No further questions.

Mr. Cooke: That is defendants' case, your Honor.

The Court: Any rebuttal?

Mr. Platt: We want to put Mr. Denson on in rebuttal, but it is rather late.

The Court: We will take a recess until tomorrow morning at 10:00 o'clock. [940]

Thursday, December 19, 1946, 11:00 a.m.

Appearances as at previous sessions.

The Court: Do I understand, Mr. Cooke, the defense rested?

Mr. Cooke:

P. G. DENSON,

having been previously sworn, testified on rebuttal as follows:

Direct Examination

By Mr. Platt:

Q. Mr. Denson, you heard the testimony of Charles W. Mapes, Jr., one of the defendants, with respect to a conversation he had with you in your room at the Sir Francis Drake Hotel in San Francisco on April 1, 1946. In that conversation he stated that impliedly, at least, that you called him a damn kid. He qualified that by stating that you didn't actually call him that but addressing my question to that particular conversation, I wish you would tell the Court, as nearly as you can, the entire conversation, what you said and what Mr. Mapes said, which occurred upon that occasion.

Mr. Cooke: I submit this has been gone over on direct examination of Mr. Denson.

The Court: I think under the circumstances it may be permitted. Objection will be overruled.

A. Charles and I—I went to my room first, then Charles came down, I presume about five minutes after he had gone up to [941] assist Miss Mason with

(Testimony of P. G. Denson.)

her drawings up to her room. Charles came in and stated to me, he says, "Mr. Denson," he says, "I want to talk over some things with you." He says, "As you know, you have known for some time, that mother has gone ahead with the other two stories of the building cost of labor is high and material is high and expenses of the building are running more and," he says, "we have had big offers, Mr. Denson, for the sky room. In fact, it is just out of our reach and you and I can't begin to compete with the offer." I said to Charles that I didn't like to give up the sky room and he informed me that well, if I wanted to give it up or not, I would have to give it up. Then I informed him that our contract called for the sky room and specifically stated the sky room. Then he informed me, "Well," he said, "Mother was rushed into that contract." That remark I resented because I knew that Mrs. Mapes had not been rushed into the contract.

Q. Well just state what you said.

A. So I informed Charles to that effect. Charles got——

Q. (Interrupting) What did you say when you informed him about Mrs. Mapes not being rushed into the contract?

A. I told Charles that our contract called for it and I didn't want to give up the sky room. Charles said—got up out of his chair—he said, "Well, Mr. Denson, if that is the way you are going to take it, there is no need of discussing it with you any further." I asked Charles to sit down. I said, "No

(Testimony of P. G. Denson.)

need [942] of getting excited, Charles, over this. Sit down and let's talk this over." I told him I was very much surprised, knowing that he and I were starting out as partners into this project, that he would act that way. I tried to explain things to him and asked him if he really ever sat down to think just what Mrs. Mapes' return would be from our operation of the hotel. "Oh, yes," he says, "I have gone into that but," he said, "Mr. Denson, there is no use talking to mother. We just don't get the sky room." Well, I informed him I wouldn't give the sky room up. He went out the door and he said, "I will be back again at five o'clock to talk to you some more about it." Later on he phoned me to join him to have a drink in the Persian Room. His uncle and his girl friend were there and I had invited Charles and his uncle to be my guests at dinner, but Charles didn't want to have dinner at the Persian Room, wanted to go down to Bernsteins. In fact, his uncle wouldn't let me take care of the check. So Charles and I walked down there together and Charles talked some more to me about the sky room and going back Charles and I walked together again and he made the statement about this big offer for the sky room. He said, "Mr. Denson, this is a legitimate offer, they are friends of ours." We continued on Powell street to the corner of Sutter. He said, "Mr. Denson, we still have the rest of the hotel and the casino part down stairs too. Why can't we give up the sky room?" He said, "I have to [943] stand by mother and Gloria. I want

(Testimony of P. G. Denson.)

to go along with you." I said, "Charles, I am not asking you to turn against your mother and Gloria, but for us to give up the sky room—our contract calls for it." He says, "I am sure, Mr. Denson—he wanted me to come to Reno the next day with him and Mr. Moorehead and his uncle. I told him, "No, I am going to take the plane back to Los Angeles." Mrs. Denson was down there and I had an appointment down there to keep and I would return and be over in Reno in a week or ten days. He said, "I am sure, Mr. Denson, if you come over to Reno you and mother and I can get together and thrash this thing out and make it agreeable for all of us." I said, "Charles, I will come over, but I still do not want to give up the sky room, but one thing I want to make clear, I was very much surprised at the way you talked." I said, "You were more or less insulting" and I did remark I didn't let any one shove me around. I said, "I am surprised too that you would talk and treat me like that." He said, "I have already forgotten that." I said, "Charles, I am going to pass it off and forget it." I said, "It won't happen again." The whole thing, Mr. Platt, is just surrounded around this sky room, the offer they had; that is the whole trouble and nothing else but that.

Q. Did you at that time, Mr. Denson, or at any other time, ever call Charles Mapes a damn kid or call him anything that would savor of that statement? [944]

(Testimony of P. G. Denson.)

A. No, Mr. Platt, at no time. Charles and I were just as friendly as we could possibly be all the way through. In fact, I treated Charles as if he was my own son and I was very friendly, I felt just like one of the Mapes family. They knew my movements. They knew where I was all the time. We worked together on everything. There was never any unpleasantness between Charles and Mrs. Mapes and I, never any misunderstanding about anything at all. The only little misunderstanding was that that 23rd when the contract was signed, when I insisted on Mrs. Mapes sending for Mr. Cooke and I let Mrs. Mapes know I was not trying to do anything under cover. This whole case is just this sky room, the money they have been offered by some one, I don't know who.

Mr. Cooke: I move to strike all the answer except the first part.

Witness: This whole case Mr. Cooke, you know this yourself too; I am surprised at you.

Mr. Cooke: I move to strike that portion of the answer after "one of the family," and also move to strike the remarks addressed to myself.

The Court: Everything after "one of the Mapes family" may be stricken.

Q. Mr. Denson, as I recall it, Mr. Mapes also stated that at one of the interviews you had with him that you expressed a desire to put a laundry in the sky room. Do you recall the date [945] of the conversation given by Mr. Mapes with respect to the laundry, putting a laundry up there?

(Testimony of P. G. Denson.)

A. I don't think nothing was ever said about a laundry. I couldn't remember the date because there was never anything said about a laundry. I never heard of it before until yesterday.

Q. Well then, did such a conversation take place as Mr. Mapes stated, or didn't it?

A. No, it didn't. Nothing was ever said in regard to any laundry at all. Never had any conversation about a laundry, never heard anything about it.

Q. At no time or no place?

A. At no time.

Mr. Platt: I think that is all.

Cross-Examination

By Mr. Cooke:

Q. Calling your attention to what was presented to Charles Mapes last evening as a part of Barker Bros. plans, diagrams or sketches of the sky room, you know what I am referring to, do you not, Mr. Denson? A. Yes, I do.

Q. Do you recall that being used in the talk that was had down there April 1, 1946?

A. This same sketch, yes sir. Part has been torn off there. The other part is around here. [946]

Q. What was the part that was torn off?

A. That is part that goes out into the dining room and part of the sky room and I think extends on back to the music stand.

Q. Wasn't the matter of a laundry being located on the river side, on the southeast corner of the building in the sky room, discussed at that date?

A. No sir.

(Testimony of P. G. Denson.)

Q. Were you there throughout?

A. I was there throughout, yes sir.

Q. You say you never heard anything about the laundry in the sky room until this case came up for trial?

A. Until he mentioned it, yes, just yesterday.

Q. Did you hear Mr. Moorehead's testimony?

A. Yes, I heard every bit of it.

Q. This does represent location, or prospective location, of certain things on the sky room floor at the southeast corner of the building, to which Mr. Mapes objected, doesn't it?

A. Mr. Mapes didn't make any objections at that meeting in regard to anything up there. When we got to the sky room he said he didn't want to decide anything on the sky room until there was a few things he wanted to take up with Mr. Denson first. That was at the meeting right then and there and that led up to our conversation in the room.

Q. You mean by that to say that he made no statement at any rate of objection or otherwise, as to the rooms that he [947] pointed out yesterday in the southeast corner of the building as shown upon that sketch?

A. He made no objections to anything that we submitted about the sky room, that is by Miss Mason, the designer. Looked over all of them and there was quite a discussion with Mr. Slocum and Mr. Moorehead, Charles and myself, but there was nothing criticized, so far as any of those proposed plans.

Q. As a matter of fact, that has been changed, you know that, don't you? A. What is that?

(Testimony of P. G. Denson.)

Q. The sky room, southeast corner.

A. What has been changed—at that time, Mr. Cooke, none of this change was anticipated at that particular time. This is what we asked for, to carry that on out and a few days after I was notified by the mechanical draftsman up there and he showed me the drawings. Well, they have changed that—the plan will show—I can get the blueprint, if you would like to see what the original plan was, if you would like to see them.

Q. None of these things are on the sky room now?

A. Mr. Cooke, I can't tell you.

Q. The rest rooms, bakery, kitchen storage?

A. I couldn't tell you.

Q. You don't know?

A. I don't know. I couldn't tell you. I was refused the plans. [948]

Mr. Cooke: I move to strike that.

Mr. Platt: I think that is explaining why he didn't know what the present changed plans contain.

A. Mr. Cooke, I haven't seen any of the plans——

Mr. Cooke: Just a minute. I asked him if he knew and he said he didn't know because he was refused the plans. Why he didn't know, I submit, is a volunteer statement, not responsive.

The Court: It may go out.

Q. In regard to this offer that you say Charles mentioned to you at that time at the Sir Francis Drake, did he go into any details, tell you what it was, who made it?

(Testimony of P. G. Denson.)

A. I asked him two or three times what was this offer, but he just said it was a legitimate offer from friends of theirs, but I have heard what the offer is several times.

Q. I am asking you what he said.

A. He wouldn't tell me what the offer was.

Q. Wouldn't tell you the names?

A. Wouldn't tell me the names of the parties.

Q. All he said it was a legitimate offer?

A. That is right. In fact, he said it was enough to take care of the cost of one-third of the building. He did make that statement.

Q. Is that all he said about that?

A. That is all. We had quite a lengthy conversation on the [949] corner of Sutter and Powell after dinner.

Q. Upon the same subject?

A. Upon the same subject, about that particular thing.

Q. Did he tell you then who made the offer?

A. No, he would never tell me who made the offer.

Q. He didn't tell you?

A. No, I asked him some two or three times, but he never told me. Just said a friend of theirs.

Q. You have told us all you can recall about the offer and who made it?

A. He said the offer was large enough to take care of one-third of the building.

Q. You told us about that. A. Yes.

(Testimony of P. G. Denson.)

Q. I say you have told us now all you recall about what he said as to what that offer was and who made it?

A. That is correct. I don't know who made the offer; I didn't know and I don't know now who made the offer.

Q. Well, I am asking what he said, is all I am asking you? A. Yes, that is all.

Mr. Cook: I think that is all.

Mr. Platt: That is all.

The Court: Anything further?

Mr. Platt: We have no further rebuttal, your Honor.

The Court: Now about Mr. Moorehead's testimony. [950]

Mr. Platt: Your Honor please, upon examination of the transcript of the record, we are satisfied with that and we will not call Mr. Moorehead back.

The Court: Have you anything further you would like to offer?

Mr. Cooke: No; Mr. Moorehead was on cross-examination at the time we adjourned and I had not concluded, but I can't say to the Court there is anything in my mind of particular importance that I feel we would be especially injured by his not being questioned. In view of his physical condition, I do not like to do anything to impose any hardship on him, so we haven't anything further from Mr. Moorehead and we haven't any further testimony except it would be repetition.

Court adjourned at 11:40 a.m. [951]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced and the proceedings had at the trial of the case entitled, P. G. Denson, Plaintiff, vs. Irene Gladys Mapes, et al., Defendants, No. 552, held in Reno, Nevada, on October 28, 29, and 30, 1946, and December 10, 11, 12, 13, 18 and 19, 1946, and that the foregoing pages, numbered 1 to 841, inclusive, consisting of two volumes, Volume 1 being pages numbered 1 to 408, inclusive, and Volume 2 being pages numbered 409 to 841, inclusive is a full, true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, July 5, 1947.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed July 8, 1947. [952]

In the District Court of the United States of
America, in and for the District of Nevada.

Case No. 552

P. G. DENSON,

Plaintiff,

vs.

IRENE GLADYS MAPES, also known as Mrs.
Charles W. Mapes, Charles W. Mapes, Jr.,
Gloria Mapes, and Chas. W. Mapes Company,
a co-partnership,

Defendants.

DECISION AND
FINDING OF FACT AND CONCLUSIONS
OF LAW

Plaintiff prays for a decree for the specific performance of the agreement which was admitted in evidence as Exhibit "C" and which is as follows:

"This agreement entered into the 24th day of September, 1945, by and between Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, of Reno, Nevada, hereinafter designated 'first party', and Charles W. Mapes, Jr., of the same place, and P. G. Denson, of Visalia, California, hereinafter designated 'second parties';

Witnesseth:

“That whereas, the first party intends to construct a new fire-proof hotel, apartment, store building and garage, the total expense of which is now estimated at \$800,000.00, or thereabouts, at the southeast corner of Virginia and First Streets in the City of Reno, Nevada, having a frontage on Virginia Street of 167.64 feet and a frontage on First Street of 139.55 feet, in accordance with plans, a copy of which are annexed hereto, and specifications which are to be prepared by The Moorehead Company of Los Angeles, California, and which plans and specifications must be approved in writing by the parties hereto before any lease on said premises shall become effective; and

“Whereas, inclusion of 12 feet of said frontage on Virginia Street, extending 139.55 feet easterly from Virginia Street is conditioned upon the first party consummating the purchase thereof from the City of Reno, negotiations therefor with the said City being now [953] in progress; and

“Whereas, it is contemplated the first party shall grant a lease to the second parties and the second parties shall receive a lease from the first party of all said structure when completed, except eight (8) store spaces on Virginia Street and three (3) store spaces on First Street, on the first floor of said structure, as shown by the preliminary plans dated August 31, 1945 made by the said Moorehead Company, a copy whereof is annexed and made a part hereof.

“Now therefore, this agreement further witnesseth:

“1. That in consideration of the premises and for other valuable and sufficient consideration present and received, the receipt whereof is hereby mutually acknowledged by the parties, that contemporaneously with the execution and delivery hereof, the second parties shall deposit with the first party the sum of \$20,000.00 in cash as a guarantee of their good faith and by way of inducement for the first party to enter into this agreement.

“2. That the first party agrees to complete said structure at said location subsequently, according to said completed and approved plans, and specifications to be prepared and approved, on or before January 1, 1947.

“3. The parties hereto shall immediately enter into a discussion with each other as to the terms, conditions and details of said lease; that the period of said lease shall be not less than twenty (20) years from the date the premises are in condition for possession thereof to be delivered. The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease with each other for all of said structure when completed, with the exceptions above noted, provided, that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after the written contract for the construction of said structure has been entered into by the first party and within 10 days after the actual construction has been commenced.

“4. That said lease shall provide, among other things, that as soon as the hotel, rooms and apartments in said structure are ready for occupancy by the second parties, the second parties will at their own cost, now estimated at \$150,000.00, provide and place in said structure such furniture, fixtures and equipment as shall be suitable, proper and necessary to furnish and equip the same as a first class hotel and apartment building.

“5. That the rental for said structure when completed, with the exceptions noted above, shall be as follows:

5% of gross receipts from food sales

10% of gross receipts from liquors, wines and beer sales

30% of gross receipts from hotel, rooms and apartments

All rentals payable monthly.

Provided, that in the event the said percentage of gross receipts shall not equal monthly—

For coffee shop, dining room and

kitchen,\$ 600.00

For lounge, 1000.00

For Skyroom 333.33

For Mezzanine Floor banquet room, ... 150.00

then in such case, the second parties shall make up and pay to the first party the deficiency on any of said four classifications so failing. [954]

“If the lease is to include the garage, then the second parties shall pay monthly 10% of the gross

garage receipts, or, if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon.

“6. That said lease shall provide that the second parties are to execute and deliver to the first party a first chattel mortgage covering the furniture, fixtures and equipment placed in the hotel and apartments as aforesaid, to secure the rental payments as provided in said lease.

“7. That after said lease is executed between the parties hereto and if the second parties fail either to provide and place said furniture, fixtures and equipment in said hotel, rooms and apartments as aforesaid, or if they fail to execute and deliver said chattel mortgage as such security as herein required, then the cash so deposited with the first party shall belong absolutely to the first party as a consideration for her entering into this agreement.

“8. If after said lease is executed between the parties hereto as above provided, and the second parties provide and place said furniture, fixtures and equipment in said hotel and apartments as aforesaid, and second parties execute and deliver said chattel mortgage as security as herein required, then the cash so deposited with the first party shall belong to and be delivered to said second parties by the first party.

“9. The second parties as a part of said lease, will guarantee to said first party that the total annual income from the entire building which the

first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period.

“10. The said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected.

“11. Time is of the essence of each and every term, covenant and agreement herein mentioned.

“In witness whereof, the parties hereto have hereunto set their hands, the day and year first above written.

/s/ IRENE GLADYS MAPES,
First Party

Witnesses to the Signature of the First Party:

/s/ B. A. YPARRAGUIRE

/s/ H. R. COOKE

/s/ CHARLES W. MAPES, JR.,

/s/ P. G. DENSON,

Second Parties

Witnesses to the Signature of Charles W. Mapes, Jr.:

/s/ H. R. COOKE

Witnesses to the Signature of P. G. Denson:

/s/ H. R. COOKE [955]

The above agreement though signed by plaintiff on October 4, 1945, has been referred to as the agreement of September 24, 1945.

By their Answer the defendants among other things admit the following: The Jurisdictional allegations of the Complaint; status of defendants; the organization and existence of the Chas. W. Mapes Company, a co-partnership; that defendant Irene Gladys Mapes, was, on the 24th day of September, 1945, seized in fee of the lands and premises described in the said agreement of September 24, 1945; that defendant Charles W. Mapes, Jr., is the son of defendant Irene Gladys Mapes and said Charles W. Mapes, Jr., has declined and refused, and continues to decline and refuse, to join as a party plaintiff herein.

The Court, having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, now finds the facts and states conclusions of law as follows:

Finding of Fact

1. That there was no combination or confederation between the defendant Irene Gladys Mapes, Charles W. Mapes, Jr., and Gloria Mapes and the partnership referred to in the Amended Complaint to do any unlawful act or lawful act by unlawful means for the purpose of defeating the plaintiff or depriving him of any rights or equities to which he was entitled by virtue of the above set forth agreement, or to bring about a repudiation of said agreement; that the interests in this action of said

Charles W. Mapes, Jr., are antagonistic and adverse to the plaintiff.

2. That the deed of convenience of November 6, 1945, by Irene Gladys Mapes to herself as Mrs. Charles W. Mapes, Charles W. Mapes, Jr., and Gloria Mapes as co-partners doing business under the name of Chas. W. Mapes Company of Reno, Nevada, of the lands and premises described in said agreement of September 24, 1945, was made with the knowledge of all the defendants, including Gloria Mapes, of the existence of said agreement of September 24, 1945. [956]

3. That on or about the 24th day of September, 1945, the above named plaintiff and the above named defendants entered into the written agreement above set forth, Exhibit "C".

4. That plaintiff did not, at the request of the defendant Irene Gladys Mapes, or otherwise, engage an architect and contractor to construct the hotel building, the subject matter of this action; that the plaintiff, prior to the bringing of this action, conferred with the architect and contractor employed on the work and with the defendants on numerous occasions, some of said occasions being as follows: September, 1945, at the Fielding Hotel, San Francisco, California, and again August 14, 1945, at the Sir Francis Drake Hotel, San Francisco, California; present, Irene Gladys Mapes, Charles W. Mapes, Jr., plaintiff P. G. Denson and Francis Harvey Slocum, architect. Plans and sketches of the building were discussed on each of these occasions. Sug-

gestions as to plans and alterations of same were made by parties present including plaintiff, resulting in the adoption of certain of the suggestions of the plaintiff including increasing size of hotel room, elimination of one room on river frontage, increasing size of clothes closets connected with—rooms, installation of three elevators in building instead of two and the changes in “Skyroom.”

5. That the plaintiff was not requested by the defendants, or any of them, to secure a loan in any amount for the defendants for the purpose of financing the construction of said hotel building or for any other purpose; that plaintiff did attempt to assist in the procuring of a loan for the purpose of financing the construction of the contemplated hotel building by interviewing the officials of a bank and insurance company.

6. That plaintiff obtained the plans and specifications in evidence from various firms on furnishings, equipment, accessories and supplies to be installed in the said hotel.

7. That plaintiff did not sell at considerable or any financial sacrifice the hotel of which he was the sole owner and proprietor, namely, the Johnson Hotel, Visalia, California.

8. That the said agreement, Exhibit “C”, was not prepared by the attorney for the defendants but was formulated from a document prepared in the office of plaintiff’s attorney and altered as a result

of conferences between plaintiff, defendant Irene Gladys Mapes, and her attorney, H. R. Cooke; and after such revision the agreement was executed by the defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., and forwarded to plaintiff at Los Angeles, California, and thereafter signed and executed by the plaintiff in the office of the attorney for the defendants.

9. That since the execution of said agreement plaintiff has been ready and willing to receive from defendant Irene Gladys Mapes a lease of said hotel structure containing the terms which were settled and agreed upon by said agreement of September 24, 1945, but that it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiation as to terms conditions and details provided for in the agreement.

10. That from the date of the execution of said agreement up to and including on or about the 1st day of April, 1946, defendants Irene Gladys Mapes and Charles W. Mapes, Jr., and plaintiff have been conferring at various times and intervals and during said time treated and considered said agreement in full force and effect; that defendants made no representation by word, conduct, or otherwise, that a lease would be tendered plaintiff without further discussion as to the terms, conditions and details of said lease not fixed by said agreement.

11. That on or about April 1, 1946, plaintiff and defendant Charles W. Mapes, Jr., met with an

interior designer at Oakland, California, and examined and discussed plans for furniture and interior designs prepared by a furniture dealer at request of plaintiff; and that during the month of January, 1946, plaintiff requested from a dealer designs and prices for dining rooms, kitchens, bars, and other matters appertaining [958] to hotel equipment within the knowledge of the defendants.

12. That from the execution thereof to and including about the 10th day of April, 1946, the defendants retained \$10,000.00 deposited by plaintiff at the time of the execution of said contract; that the return to plaintiff of said \$10,000.00 was not offered to plaintiff until about the 10th day of April, 1946; that between the date of the execution of the agreement and April 10, 1946, the defendants, or either of them, did not, by word, act or conduct, inform the plaintiff that they would not enter into and execute a lease on said premises.

13. That the violation of the so-called time limitations in said agreement was the fault of both parties; that no further discussion as to terms, conditions and details of said lease other than those fixed in said agreement was ever requested or had by either of the parties from the execution of the contract to April 10, 1946.

14. That on or about April 10, 1946, the defendants, without good cause, repudiated said written agreement and declined and refused further performance on their part under it and stated to

plaintiff that no lease would be tendered, granted or entered into as contemplated by said agreement.

15. That Irene Gladys Mapes would not enter into an agreement for a lease of said premises, or a lease thereof, with plaintiff unless her son, defendant Charles W. Mapes, Jr., was associated with plaintiff in such agreement or lease.

16. That the deposit of \$10,000.00 cash made by plaintiff was accepted by the defendant Irene Gladys Mapes as a full compliance with the provision of the contract requiring the plaintiff and the son of Irene Gladys Mapes, defendant Charles W. Mapes, Jr., to deposit \$20,000.00 cash as guarantee of the good faith of plaintiff and the said defendant Charles W. Mapes, Jr.

17. That prior to April 10, 1946, nor any other time, was it ever considered by the parties, that plaintiff and said defendant Charles. W. [959] Mapes, Jr., were to be granted a lease of the said premises upon the basis of 30% of net earnings to plaintiff and 70% to said defendant Charles W. Mapes, Jr., but it was at all times contemplated by the parties that the net earnings of the contemplated lease would be shared equally by plaintiff and defendant Charles W. Mapes, Jr.

From the Foregoing Facts, the Court Concludes:

Conclusion of Law

That the plaintiff is not entitled to a decree of this Court for the specific performance of the agreement admitted in evidence herein as Exhibit "C",

and to compel the execution of a lease to plaintiff alone would be making a new contract for the parties, and this the Court cannot do.

The conclusions which I have reached are based upon the following reasons and matters of law:

An examination of the record will disclose that while the defendants, by their acts and conduct subsequent to the execution of said agreement, have waived the time limitations set forth in said agreement, and particularly those in Paragraphs 3 and 11 therein, the remaining provisions of Paragraph 3, and other stipulations of the contract, have not been waived. Before a lease was to be executed, a further discussion of terms was to be had, a discussion of terms and conditions other than those settled in the contract. No lease was to be executed until these additional terms, conditions and details were worked out. No further discussion or further agreement as to terms, conditions and details of lease has occurred.

In *Cochrane v. Justice Mining Co.*, 26 Pac. 780, the Supreme Court of Colorado held:

“Under the authorities, to create a valid contract of lease but few points of mutual agreement are necessary; First, there must be a definite agreement as to the extent and bounds of the property leased; Second, a definite and agreed term; and Third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials; the others, such as the covenant for the peaceful possession on the part of the lessor

diligent, proper workman-like and continuous working with view to best results, both present and prospective, on the part of the lessee; and where, as in this case, the [960] rental is a share or percentage of the proceeds, the disposition of the ore to the best advantage, the keeping of accurate and honest accounts and making honest returns, are secondary and implied covenants, growing out of the principal agreement."

The contract under discussion here is definite as to the description of the property, the term, the price of rental and the time and manner of payment, but it is not complete. In this respect it differs from the contracts ordered specifically enforced in *Cochrane v. Justice Mining Co.*, 26 Pac. 780; *Dondero v. Turrillas*, 59 Nev. 374, 94 Pac. 2d 276, and other cases cited, in there is here a definite provision that further negotiations were to be had and that no lease was to be executed except as a result of the required further negotiation as to terms, conditions and details of contemplated lease or other than those established by the agreement.

The contract involved in the cases cited above contained no provisions looking to further negotiations. The Circuit Court of Appeals of the Sixth Circuit in *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 125 F. 2d 288, held that:

"An agreement to enter into a lease should not be enforced if any of the terms of the lease are left open to future settlement. Until the minds of the parties have met on all material matters, a court should not direct specific performance."

And from the Eighth Circuit we find the case of *Scholtz v. Northwestern Mut. Life Ins. Co.*, decided March 13, 1900, in 100 F. 573. There the Court declared the law to be as follows:

“It may be conceded that an agreement to enter into a lease will neither be enforced in equity nor at law if it appears from the face of the agreement that any of the terms of the lease, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the lessor and lessee. In such cases there is no complete agreement; the minds of the parties have not fully met; and, until they have, no court will undertake to give effect to those stipulations that have been settled, or to make an agreement for the parties respecting those matters that have been left unsettled.”

In the *Scholtz* case the contract contained no provision such as here for further discussion of terms, conditions and details.

Numerous objections to the introduction of evidence were made on behalf of defendants and overruled on the theory that since the right to specific performance is a matter resting largely in the sound discretion of the court, courts have always indulged in great [961] latitude in hearing evidence to determine whether, in equity or good conscience, performance should be enforced. 58 C. J. 1191.

Another consideration moves the Court to deny specific performance. If specific performance were decreed, the Court would be compelling antagonistic parties to form a partnership or a relation in the

nature of a partnership in the control and management of a large hotel. The possibility of successful operation of this large undertaking would be jeopardized. The record unquestionably indicates antagonism between plaintiff and defendant Charles W. Mapes, Jr., and between plaintiff and defendant Irene Gladys Mapes. As an illustration of the principle involved, the following is quoted from the opinion of the Supreme Court of the United States in *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 18 S. Ct. 114, on p. 118:

“But, beyond these relations of the public to the enterprise, courts are not often wont to compel parties to unite interests and work together. And here it may be well to notice that the contract was not one in terms for a partnership in the management of the railway, but only one for division of the profits. The parties stipulated to cooperate in securing the franchise, and to divide equally the profits, but left the question of control and management unsettled. * * * It may, however, be conceded that there is an implication of joint ownership as well as of joint interest in the management, and in the profits arising therefrom, and thus it may be said that the contract was really one for a partnership. It is seldom that a court of equity will decree that a partnership which has been agreed upon shall be carried into effect. More frequently is it called upon to release parties from partnership agreements on the grounds that their antagonism prevents the fulfillment of the purposes of the partnership, and it would seem like a contradiction to force

antagonistic parties to form a partnership when it is one of the recognized rules of equity that such antagonism is ground for dissolving a partnership already existing.”

Let Judgment be entered accordingly.

Dated: At Reno, Nevada, this 23rd day of April, 1947.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed April 24, 1947.

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES
OF APRIL 24, 1947

1. Filing Decision and Findings of Fact and Conclusions of Law.
2. Entering Judgment pursuant to said Decision, etc.
3. Entering order following judgment be entered.

Judgment: That the plaintiff is not entitled to a decree of this Court for the specific performance of the agreement admitted in evidence herein as Exhibit “C.”

Dated June 26, 1947.

AMOS P. DICKEY,
Clerk.

By J. P. FODRIN,
Deputy. [963]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that P. G. Denson, the above-named plaintiff, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree made and entered in the above-entitled suit on the 24th day of April, 1947, in favor of the above-named defendants and against the above-named plaintiff, and from the whole thereof.

SAMUEL PLATT,

322 First National Bank
Bldg., Reno, Nevada.

JOHN S. SINAI,

323 First National Bank
Bldg., Reno, Nevada.
Attorneys for Appellant.

[Endorsed]: Filed May 24, 1947. [964]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that we, Peter G. Denson of the City and County of San Francisco, State of California, as Principal, and the London & Lancashire Indemnity Company of America, a corporation organized under the laws of the State of New York and duly qualified to transact a surety business in the State of Nevada, as Surety, are held and firmly bound unto the above-named defendants, Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, Charles W. Mapes, Jr., Gloria Mapes, and Chas. W. Mapes Company, a co-partnership, in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States of America, to be paid to the said Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, Charles W. Mapes, Jr., Gloria Mapes, and Chas. W. Mapes Company, a co-partnership, [972] for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of May, 1947.

Whereas, on the 21st day of May, 1947, a judgment and decree was rendered against the plaintiff, Peter G. Denson, in the above-entitled action, and

the said plaintiff and appellant, Peter G. Denson, appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such that if the said Peter G. Denson shall prosecute an appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and effect.

Signed and sealed and dated at Reno, Nevada, this 21st day of May, 1947.

/s/ PETER G. DENSON,
Principal.

[Corporation Seal]

LONDON & LANCASHIRE IN-
DEMUNITY COMPANY OF
AMERICA,

By /s/ FRANK HASSETT,
Attorney-in-Fact.
Surety.

[Endorsed]: Filed May 24, 1947.

State of Nevada,
County of Washoe—ss.

On this 21st day of May, A. D. one thousand nine hundred and forty-seven, personally appeared before me, the undersigned, a Notary Public in and for said County of Washoe, Peter G. Denson, known (or proved) to me to be the person described in and who executed the annexed instrument, who acknowledged to me that he executed the same, freely and voluntarily, and for the uses and purposes therein mention.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the County of Washoe, the day and year in this Certificate first above written.

[Notarial Seal] MARIE DOONER,
Notary Public in and for the County of Washoe,
State of Nevada.

My commission expires April 10th, 1951.

State of Nevada,
County of Washoe—ss.

Frank Hassett, being first duly sworn on oath, says that he is agent and Attorney-in-Fact of London & Lancashire Indemnity Company, a corporation, surety on the within and foregoing bond. That said surety is a corporation organized and existing under and by virtue of the laws of the State of New York, and doing business in the State of Nevada; that said surety has complied with all the laws of the State of Nevada with respect to foreign corporations doing business within said State; that he is duly authorized to execute and deliver the foregoing obligation; that said Company is authorized to execute the same, and has complied with the laws of the State of Nevada in reference to becoming sole surety upon bond, undertakings and obligations.

/s/ FRANK HASSETT.

Subscribed and sworn to before me this 21st day of May, 1947.

[Notarial Seal]

/s/ MARIE DONNER,

Notary Public.

My commission expires April 10, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S.
DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of P. G. Denson, Plaintiff, vs. Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, Charles W. Mapes, Jr., Gloria Mapes and Chas. W. Mapes Company, a co-partnership, Defendants, No. 552, on the civil docket of said Court.

I further certify that the attached transcript, consisting of 983 typewritten pages number from 1 to 983, inclusive, contains a full, true and correct transcript of the proceedings in said cause and of all papers filed therein, together with the endorsements of filing thereon, as set forth in "Designation of Contents of Record on Appeal" and "Designation of Additional Portions of Record, Proceedings and Evidence to be Included in Record on Appeal," filed May 24, 1947, and June 2, 1947, respectively, all of which are filed in this [982] cause and made a part of the transcript attached thereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

And I further certify that the cost of preparing and certifying to said record, amounting to \$118.70, has been paid to me by Samuel Platt, Esq., one of the attorneys for appellant.

Witness my hand and the seal of said United States District Court this 18th day of July, 1947.

[Seal] AMOS P. DICKEY,
Clerk, U. S. District Court.

[Endorsed]: No. 11692. United States Circuit Court of Appeals for the Ninth Circuit. P. G. Denson, Appellant, vs. Irene Gladys Mapes, also known as Mrs. Charles W. Mapes, Charles W. Mapes, Jr., Gloria Mapes and Chas. W. Mapes Company, a co-partnership, Appelles. Upon appeal from the District Court of the United States for the District of Nevada.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Filed July 21, 1947.

United States Circuit Court of Appeals
For the Ninth Circuit

11692

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs.
Charles W. Mapes, Charles W. Mapes, Jr.,
Gloria Mapes, and Chas. W. Mapes Company,
a co-partnership,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
THE APPEAL, AND DESIGNATION OF
PARTS OR RECORD UPON WHICH THE
APPELLANT INTENDS TO RELY.

Point 1.

The trial court erred in denying plaintiff-appellant relief by way of specific performance, for the reason that the findings of fact of the trial court sustain every material allegation of plaintiff's amended complaint, as follows:—

1. That the parties entered into a written agreement for the leasing of the hotel premises. (Decision and Findings, pg. 5, par. 3).

2. That since the execution of the agreement, plaintiff has been ready and willing to receive

from the defendant, Irene Gladys Mapes, a lease of said hotel structure containing the terms which were settled and agreed up by said agreement. (Decision and Findings, pg. 6, par. 9).

3. That from the date of the execution of the agreement, up to and including about April 1, 1946, all the parties treated and considered the agreement in full force and effect. (Decision and Findings, pg. 6, par. 10).

4. That the plaintiff and defendant, Charles W. Mapes, Jr., at various times examined and discussed plans for furnishing and equipping the hotel as provided in the agreement. (Decision and Findings, pg. 6, par. 11).

5. That plaintiff deposited \$10,000.00 with defendant, Irene Gladys Mapes, as a guarantee of good faith, and which was accepted by her as a full compliance with the provisions of the contract. (Decision and Findings, pg. 7, par. 16).

6. That this deposit was retained and was not offered to plaintiff until about April 10, 1946; and from the date of the contract up to April 10, 1946, none of the defendants, by word, act, or conduct, informed the plaintiff they would not execute a lease. (Decision and Findings, pg. 7, par. 12).

7. That on or about April 10, 1946, the defendants, without good cause, repudiated said written agreement and declined and refused further performance of their part under it, and stated to

plaintiff that no lease would be tendered, granted or entered into as contemplated by said agreement. (Decision and Findings, pg. 7, par. 14).

8. The time limitations of the agreement have been waived by all parties. (Decision and Findings, pg. 7, par. 13, and pg. 8, lines 16-20).

9. That the defendant, Irene Gladys Mapes, upon the execution of the agreement, was represented by an attorney at law. (Decision and Findings, pg. 6, lines 9-10).

10. It was always contemplated that the net earnings of the contemplated lease would be shared equally by plaintiff and defendant, Charles W. Mapes, Jr. (Decision and Findings, pg. 8, lines 9-10).

11. The contract under discussion here is definite as to description of the property to be leased, the term, the price of rental and the time and manner of payment. (Decision and Findings, pg. 9, lines 5-7).

These findings, alone, entitle plaintiff to a decree of specific performance.

Point 2.

The trial court finds that the defendants without good cause repudiated said written agreement. Neither law nor equity upholds or sanctions a breach or repudiation of a written contract, without good cause. The trial court erred in not having ordered and entered a decree in favor of the plaintiff for the specific performance of the agreement.

Point 3.

The defendant, Irene Gladys Mapes, having repudiated the agreement without good cause, was, and is obligated to tender the plaintiff a lease containing the material and essential provisions as provided in the agreement, and such usual and customary provisions as contemplated by the agreement. The trial court erred in not having so decreed.

Point 4.

The plaintiff fully performed. The defendant, Irene Gladys Mapes, breached and repudiated before performance on her part. It was error for the trial court to have sustained the defendant in her inequitable breach, and to have penalized the plaintiff for his faithful performance.

Point 5.

The contract contains the material and essential elements, provisions and covenants to be embodied in the lease. In equity, such a contract should be specifically enforced. The trial court erred in denying this relief.

Point 6.

The contract clearly shows that it was the intention of the parties that the lease should contain the material and essential elements therein specifically indicated, and that only incidental matters and usual and customary conditions to effectuate this intent should be further negotiated. Such a contract should be specifically enforced in equity. The trial court erred in not so decreeing.

Point 7.

The contract is complete in its essential terms and it was the intention of the parties that they should be bound by it. The execution of the lease was a formality "to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement." (Contract, par. 10). The trial court, therefore erred, in not decreeing specific performance.

Point 8.

The defendants, having repudiated the contract without cause, before tendering a form of lease or negotiating therefor, should be obligated in equity, so to do, by court decree. The court through the equitable power of supervision should have decreed that the lease so tendered should "fully effectuate the intent and purposes of the parties hereto as stated in this "preliminary agreement." The trial court erred in denying this relief to the plaintiff.

Point 9.

The trial court by its decree, brings, in error, the interposition of equity, to support the defendant Irene Gladys Mapes in her established and conceded unwarranted violation of the contract.

Point 10.

The contract is complete and definite in itself. It contains no condition that it shall become definite, final or absolute only upon the happening of some

future contingency. It is a contract in praesenti, for which the plaintiff was obligated to deposit, and did deposit, Ten Thousand Dollars in cash as an evidence of good faith. The trial court erred in not compelling the defendants, by decree to perform.

Point 11.

The fact that the contract provided for the formal and later execution of a lease, did not negative the existence of the contract, the terms of which had been assented to and agreed upon. The trial court erred in not so decreeing.

Point 12.

All the terms, covenants and conditions of the contract, agreed up, are complete, definite and certain. The trial court was in error in decreeing otherwise. The additional conditions to be incorporated in the lease, the parties have agreed, should be made certain and complete by negotiation. They provided the method by which certainty and completeness was to be reached. They acted within the rule of equity that "that which may be made certain is certain." The trial court erroneously failed to follow this well-established maxim of equity. The defendants, captiously and without cause, having repudiated the contract, which contained the essential elements of the lease, and refused to negotiate, the court should have ordered them to negotiate,

and on failure of which the court should have decreed the additional, reasonable, subordinate and customary provisions of the lease, as contemplated by the contract. "Equity regards as done that which ought to be done."

Point 13.

The trial court's conclusion, (Decision and Findings, pg. 10, line 7) that specific performance should be denied because the parties were antagonistic, is erroneous and not supported in equity. The court erroneously concluded that this is a suit to enforce an agreement to form a partnership. The present suit is for a decree to compel the performance of an agreement to lease. Under the facts of this case, the plaintiff's rights may not be destroyed because of the association of a co-lease, who is a son of the principal defendant, and who joined with his mother "for no cause" inequitably and unconscionably, to defeat plaintiff of his just rights.

Point 14.

The evidence and the findings establish conclusively that the defendants acted with the utmost bad faith. The equities are overwhelmingly with the plaintiff. The trial court's finding (*supra*) that the defendants repudiated the agreement without cause, is a plain conclusion that the agreement is still in full force and effect. Why should not the

defendants be compelled to perform? In support of the contention that the defendants acted with the utmost bad faith appellant refers to the evidence of all the witnesses, detailed extracts from which by page and number will be specifically designated later in appellant's brief, after receipt of the printed record.

Point 15.

The trial court erred in failing to conclude that the material and essential provisions to be contained in the lease were agreed upon with certainty, definiteness and completeness, and that it was the intention of the parties later to negotiate for minor, customary and subsidiary conditions "to fully effectuate the intent and purpose of the parties" to the contract. (Quoted part from Agreement, pg. 3, par. 10 Court's Opinion). That the contemplation of a formal lease did not destroy the completeness and certainty of the contract.

Point 16.

It was the plain duty of the defendant owner of the property to have submitted a form of lease to the plaintiff for his consideration, before her sudden repudiation of the agreement without good cause. The plaintiff was foreclosed by the unwarranted act of repudiation from his right, guaranteed by the agreement, to give consideration to any proposed terms to be embodied in the lease. The trial court

by denying plaintiff relief by way of specific performance, erroneously deprived plaintiff of this right, in the face of the court's finding that the agreement was still in full force and effect.

/s/ SAMUEL PLATT,
/s/ JOHN S. SINAI,
Attorneys for Appellant.

Service of the within and foregoing admitted, by copy, this 6th day of June, 1947.

/s/ H. R. COOKE,
/s/ JOHN D. FUHR, Jr.,
Attorneys for Appellees.

[Endorsed]: Filed July 21, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The above named appellant hereby designates the following portions of the record, proceedings and evidence herein to be contained in the Record on Appeal:

1. Plaintiff's Amended Complaint.
2. Defendant's Answer thereto.
3. Trial Court's Findings of Fact and Conclusions of Law, Opinion, together with a direction of entry of judgment thereon.

4. Judgment and decree appealed from.
5. Transcript of Testimony reported by the Court Reporter.
6. Depositions of Leon Huckins, Ruth Mason, Douglas Stone, George T. Thompson, Harvey M. Toy, Dan E. London, Will P. Taylor, S. P. Barash, and Thomas E. Hull, offered and admitted in evidence.
7. Notice of Appeal with date of filing.
8. Cost Bond on Appeal.
9. All exhibits excluded.
10. Statement by the Appellant of the points on which he intends to rely.

Dated this 6th day of August, 1947.

/s/ SAMUEL PLATT,

Attorney for Appellant.

Service, by copy, of the within and foregoing Designation of Contents of Record on Appeal is hereby admitted this 6th day of August, 1947.

JOHN D. FUHR, Jr.,

/s/ H. R. COOKE,

Attorneys for Appellees.

[Endorsed]: Filed August 8, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD, PROCEEDINGS AND EVIDENCE
TO BE INCLUDED IN RECORD
ON APPEAL

The appellees above named hereby designate the additional portions of the Record, proceedings and evidence to be included in the Record on Appeal, viz.:

1. Notice of Motion by Defendants to Dismiss and, Subject thereto, to Strike Portions of Plaintiff's Amended Complaint.

2. That the Transcript of Testimony reported by the Court Reporter shall include all objections, argument and rulings thereon as reported in shorthand by the official Court Reporter.

Dated: August 9, 1947.

/s/ H. R. COOKE,
JOHN D. FUHHR, Jr.,
Attorneys for Appellees.

Services, by copy, of the foregoing Designation admitted this 9th day of August, 1947.

/s/ SAMUEL PLATT,
Attorney for Appellant.

[Endorsed]: Filed Aug. 11, 1947.

No. 11,692

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF FOR APPELLANT.

SAMUEL PLATT,

First National Bank Building, Reno, Nevada,

Attorney for Appellant.

FILED

NOV 19 1947

PAUL P. O'BRIEN,

CLERK

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No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

VS.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF FOR APPELLANT.

STATEMENT CONCERNING JURISDICTION.

On the 22nd day of June, 1946, the appellant, as the then plaintiff, filed his complaint in the District Court of the United States, in and for the District of Nevada, and later an amended complaint (Tr. Vol. 1, p. 1), alleging diversity of citizenship, in that the appellant, the then plaintiff, is and was a citizen of the State of California, and that appellees, the then defendants, were and are all citizens of the State of Nevada; and that the amount in controversy exceeds,

exclusive of interest and costs, the sum of three thousand (\$3,000.00) dollars.

Jurisdiction of the United States District Court is and was based upon Title 28 U.S.C.A., Section 41, which provides:

“The District Court shall have jurisdiction as follows: (1) * * * or when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars, and * * * (2) is between citizens of different states * * *”

The controversy was tried before the court without a jury and a judgment was entered on the 23rd day of April, 1947, in favor of the defendants. (Tr. Vol. 2, p. 908.)

On the 24th day of May, 1947, the plaintiff-appellant filed notice of appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the District Court of the United States in and for the District of Nevada. (Tr. Vol. 2, p. 925.)

Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based upon Title 28 U.S.C.A., Section 225, which provides:

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error, final decisions: First in the District Courts in all cases, save where a direct review may be had, in the Supreme Court, under Section 345 of this title.”

STATEMENT OF THE CASE.

The appellant (who was the plaintiff in the trial court), together with the defendant Charles W. Mapes, Jr., entered into a written agreement with the defendant, Irene Gladys Mapes, mother of Charles W. Mapes, Jr., for a lease of a hotel she contemplated building in Reno, Nevada. (Tr. Vol. 2, p. 908.) The agreement bears date September 24, 1945, the date it was signed by Irene Gladys Mapes, but it was not executed by all parties until October 4, 1945. On April 10, 1946, the defendant, Irene Gladys Mapes, through her attorney, H. R. Cooke, Esq., notified the plaintiff that she would not grant a lease. No reason was given plaintiff for the repudiation of the agreement. The trial court found that the repudiation was "without good cause". (Tr. Vol. 2, p. 918, Par. 14.) The plaintiff (this appellant) then filed this suit in equity for the specific performance of the contract. The defendant, Charles W. Mapes, Jr., son of Irene Gladys Mapes, having refused to join as a co-plaintiff in the suit, was made a party defendant. Later, it being discovered that Irene Gladys Mapes had conveyed an interest in the property, an amended complaint, by leave of court, was filed. (Tr. Vol. 1, p. 2.) The trial court found that this conveyance was made with knowledge by the defendants of the contract for lease. (Tr. Vol. 2, p. 915, Par. 2.) The case was tried before the court, and a decree and order was entered in favor of the defendants, denying the plaintiff's prayer for specific performance and equitable relief. This appeal is from that decree and order.

**FURTHER FACTS, BRIEFLY STATED, AS ESTABLISHED
BY THE EVIDENCE.**

The plaintiff-appellant, was an experienced and reliable hotel operator. (Depositions, Tr. Vol. 2, p. 709 et seq.) Learning that the defendant Irene Gladys Mapes was contemplating building an hotel in Reno, Nevada, he came to Reno, sometime in March or April, 1940, and interviewed her at her home with respect to an association as an operator and manager thereof. Later in that year another conversation was had, but negotiations were suspended during the war and again renewed in April or May of 1944. (Tr. Vol. 1, pp. 172, 176; Vol. 2, p. 438.) Another interview took place in Reno in September, 1944, during which it was suggested that Charles W. Mapes, Jr., the son of the defendant Irene Gladys Mapes, was to be associated with plaintiff, to which the plaintiff agreed. (Tr. Vol. 1, p. 180.)

On August 14, 1945, at the request of the defendant, Irene Gladys Mapes, the parties met in San Francisco and discussed, for two or three days with the builder and architect, tentative plans for the hotel. (Tr. Vol. 2, p. 487; Vol. 1, p. 334, et seq., p. 181.) On this occasion the plaintiff escorted the defendants about San Francisco and showed them various hotels in that City. (Tr. Vol. 1, p. 186.) Later, the parties met again in San Francisco and again discussed hotel plans with the architect and builder. (Tr. Vol. 1, p. 188.) On September 21, 1945, plaintiff and the defendant son, Charles W. Mapes, Jr., came to Reno for further discussion. (Tr. Vol. 1, p. 188.) Upon the following Sun-

day, September 23, 1945, at the home of the defendant, Irene Gladys Mapes, the parties and defendants' attorney, H. R. Cooke, discussed the terms and provisions of the contract, later entered into, admitted in evidence herein and marked Exhibit "C". (Tr. Vol. 1, p. 190.)

A general form of contract was submitted by the plaintiff, which it was agreed should be put in legal form by defendants' attorney and sent to the plaintiff at the Biltmore Hotel, Los Angeles, California. (Tr. Vol. 1, p. 192; Vol. 2, p. 695.) The plaintiff left Reno that night. The next day the contract was signed by the defendant, Irene Gladys Mapes, duly witnessed and sent by mail that night to the plaintiff at Los Angeles, California. (Tr. Vol. 1, p. 192.) Upon its receipt, the plaintiff phoned the defendant Irene Gladys Mapes, and called her attention to an inadvertence in the contract with respect to plaintiff's guarantee for faithful performance, as set out in paragraph 9 of the contract. The plaintiff was authorized over the phone by the defendant, Irene Gladys Mapes, and her attorney, to interline the correction, which he did. (Tr. Vol. 1, p. 193.) Later, on October 4, 1945, plaintiff returned to Reno with the contract, the initials of all parties were placed opposite all interlineations and the contract was duly signed, witnessed and executed by all of the parties in the office of defendants' attorney, on that day. (Tr. Vol. 1, p. 193; Vol. 2, p. 568.)

The plaintiff then and there gave the defendant, Irene Gladys Mapes, his check for ten thousand

(\$10,000.00) dollars, his half of the amount required, as a "guarantee" of good faith. (Tr. Vol. 2, p. 605; Vol. 1, p. 449.) The amount was later deposited by her to her account in the bank. (Tr. Vol. 1, p. 450.) This payment was, and still is, retained by her and was only offered in return subsequent to April 10, 1946, and after she had repudiated the contract, "without good cause". (Findings, Tr. Vol. 2, p. 941.)

The defendant, Irene Gladys Mapes, fully understood the agreement. (See her testimony, Tr. Vol. 2, pp. 458-464.)

From October 4, 1945, the date the contract was executed, and the good faith money paid, all through the ensuing months up to April 10, the following year, 1946, the utmost cordiality prevailed. The time limitations of the contract were waived. (Findings, Tr. Vol. 2, p. 918, Par. 12; p. 920.) Up to April 1, 1946, "the defendants, Irene Gladys Mapes and Charles W. Mapes, Jr., and plaintiff, have been conferring at various times and intervals and during said time treated and considered said agreement in full force and effect". (Quoted from Findings, Tr. Vol. 2, p. 917, Par. 10.) That none of the defendants, "by word, act or conduct" up to April 10, 1946, ever informed the plaintiff "that they would not enter into and execute a lease for the said premises". (Findings, Tr. Vol. 2, p. 918, Par. 12.)

On the 28th day of December, at the request of the defendant, Charles W. Mapes, Jr., the plans for the hotel were further discussed at the office of the builder at Oakland, California, with the plaintiff in attend-

ance. (Tr. Vol. 1, p. 362.) The builder, Mr. Moorehead, at other times discussed plans with the plaintiff. (Tr. Vol. 1, p. 334, et seq.) Cordial letters were sent to plaintiff by the defendant, Charles W. Mapes, Jr., on November 20, 1945 and December 3, 1945. (Tr. Vol. 2, p. 636, et seq.; Vol. 1, p. 259.)

The defendants caused to be published in local newspapers, large feature articles, conspicuously featuring plaintiff-appellant as one of the managers of the hotel. (Tr. Vol. 2, p. 643.)

On April 10, 1946, the defendant, Irene Gladys Mapes, suddenly repudiated the contract through her attorney, who told the plaintiff-appellant that his client, the defendant, Irene Gladys Mapes, would not go through with it. (Tr. Vol. 1, p. 280.) The trial court found that this repudiation was without good cause. (Tr. Vol. 2, p. 918, Par. 14.) The plaintiff-appellant then brought this suit in equity for specific performance.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

ASSIGNMENT No. I.

The trial court erred in denying plaintiff-appellant relief by way of specific performance, for the reason that the findings of fact of the trial court sustain every material allegation of plaintiff's amended complaint as follows:

(a) "That the parties entered into a written agreement for the leasing of the hotel premises." (Tr. Vol. 2, p. 915, Par. 3.)

(b) “That since the execution of the agreement, plaintiff has been ready and willing to receive from the defendant, Irene Gladys Mapes, a lease of said hotel structure containing the *terms which were settled and agreed upon by said agreement.*” (Tr. Ibid., Par. 9.)

(c) “That from the date of the execution of the agreement, up to and including about April 1, 1946, all the parties treated and considered the agreement in full force and effect.” (Tr. Ibid., Par. 10.)

(d) That the plaintiff and defendant, Charles W. Mapes, Jr., at various times examined and discussed plans for furnishing and equipping the hotel as provided in the agreement. (Tr. Ibid., Par. 11.)

(e) That plaintiff deposited ten thousand (\$10,000.00) dollars with defendant, Irene Gladys Mapes, as a guarantee of good faith, and which was accepted by her as a full compliance with the provisions of the contract. (Tr. Ibid., Par. 16.)

(f) That this deposit was retained and was not offered to plaintiff until about April 10, 1946; and from the date of the contract up to April 10, 1946, none of the defendants, by word, act, or conduct, informed the plaintiff they would not execute a lease. (Tr. Ibid., Par. 12.)

(g) “That on or about April 10, 1946, the defendants, *without good cause*, repudiated said written agreement and declined and refused further performance on their part under it, and stated to plaintiff that no lease would be tendered, granted or entered into as contemplated by said agreement.” (Tr. Ibid., Par. 14.)

(h) “The time limitations of the agreement have been waived by all parties.” (Tr. Vol. 2, p. 920.)

(i) That the defendant, Irene Gladys Mapes, upon the execution of the agreement was represented by an attorney at law. (Tr. Vol. 2, p. 917, Par. 8.)

(j) It was always contemplated that the net earnings of the contemplated lease would be shared equally by plaintiff and defendant, Charles W. Mapes, Jr. (Tr. Vol. 2, p. 919, Par. 17.)

(k) “The contract under discussion here is definite as to description of the property, the term, the price of rental and the time and manner of payment.” (Tr. Vol. 2, p. 921.)

These findings, alone, entitle plaintiff to a decree of specific performance.

ASSIGNMENT No. II.

The trial court was in error in not applying the well recognized principle of law and equity that “Where a person by his contract charges himself with an obligation possible to be performed, he must perform it.” (13 *C. J.* 635, Section 706.) The contract obligated the defendant, Irene Gladys Mapes, to negotiate with the plaintiff for the remaining provisions of the lease, which were clearly incidental and subordinate to the material and essential terms expressly set out in and agreed upon by the contract. She violated this obligation by repudiation of the contract “without good cause”. (Findings, *supra*.) She should be compelled in equity to perform. By failing so to de-

cree, the trial court erroneously upheld her in her confessed and unwarranted violation.

ASSIGNMENT No. III.

The trial court's decree was based in part upon the reasoning "That it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations as to terms, conditions and details, provided for in the agreement". (Findings, Tr. Vol. 2, p. 917, Par. 9.) The court erred in attempting to excuse defendants' utter lack of performance by expressing a mere speculative doubt that plaintiff, who had admittedly faithfully performed, would not continue to perform. The court erred in attempting to substitute its judgment for that of the plaintiff, who had the exclusive right under the contract to determine whether he would accept a tendered lease or not. The court further erred in not compelling the defendants by decree to tender a lease, which in law and equity they were obligated to do. The court further erred in not recognizing its continued equitable powers to see to it that the tendered lease contained the material and essential provisions expressly provided in the contract, and that the additional provisions "to fully effectuate the intent and purposes of the parties" (see Agreement, *supra*), should be fair, reasonable and just.

ASSIGNMENT No. IV.

The court based its conclusion primarily that because the parties contemplated further negotiations

before a lease could be executed, the plaintiff is not entitled to specific performance. The court erroneously failed to consider that the contract is still in full force and effect, is a good and valid contract, containing terms definitely agreed upon, that there is no forfeiture clause in it, that it was repudiated by the defendants without good cause, that the defendants admittedly failed to perform, for which performance the plaintiff paid them ten thousand (\$10,000.00) dollars as an evidence of good faith, that the contract contained the material and essential elements of the lease, which is all that is required to make it enforceable, that the defendants having arbitrarily repudiated their right to negotiate, waived that right and were estopped from asserting it, and that their unwarranted breach of the contract gave the plaintiff an immediate right of action.

ASSIGNMENT No. V.

The court erred in reaching the inconsistent conclusion that though the defendants breached the contract without good cause, and by their acts waived, refused and repudiated further negotiations, yet they were entitled to recover because the contract provided for further negotiation.

ASSIGNMENT No. VI.

The contract clearly shows that it was the intention of the parties that the lease should contain the material and essential elements therein specifically agreed upon, and that only incidental matters and usual and

customary conditions to effectuate this intent should be further negotiated. Such a contract should be specifically enforced in equity. The trial court erred in not so decreeing.

ASSIGNMENT No. VII.

The contract is complete in its essential terms and it was the intention of the parties that they should be bound by it. The execution of the lease was a formality "to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement". (Contract, Par. 10.) The trial court, therefore, erred in not decreeing specific performance.

ASSIGNMENT No. VIII.

The defendants, having repudiated the contract without cause, before tendering a form of lease or negotiating therefor, should be obligated in equity, so to do, by court decree. The court through equitable power of supervision should have decreed that the lease so tendered should "fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement". The trial court erred in denying this relief to the plaintiff.

ASSIGNMENT No. IX.

The trial court by its decree, brings, in error, the interposition of equity, to support the defendant, Irene Gladys Mapes, in her established and conceded unwarranted violation of the contract.

ASSIGNMENT No. X.

The contract is complete and definite in itself. It contains no condition that it shall become definite, final or absolute only upon the happening of some future contingency. It is a contract *in praesenti*, for which the plaintiff was obligated to deposit, and did deposit, ten thousand (\$10,000.00) dollars in cash as an evidence of good faith. The trial court erred in not compelling the defendants, by decree, to perform.

ASSIGNMENT No. XI.

The fact that the contract provided for the formal and later execution of a lease, did not negative the existence of the contract, the terms of which had been assented to and agreed upon. The trial court erred in not so decreeing.

ASSIGNMENT No. XII.

All the terms, covenants and conditions of the *contract* agreed upon, are complete, definite and certain. The trial court was in error in decreeing otherwise. The additional conditions to be incorporated in the *lease*, the parties have agreed, should be made certain and complete by negotiation. They provided the method by which certainty and completeness was to be reached. They acted within the rule of equity that "that which may be made certain *is* certain". The trial court erroneously failed to follow this well-established maxim of equity. The defendants, captiously and without cause, having repudiated the contract, which contained the essential elements of the lease,

and refused to negotiate, the court should have ordered them to negotiate, and on failure of which the court should have decreed the additional, reasonable, subordinate and customary provisions of the lease, as contemplated by the contract. "Equity regards as done that which ought to be done."

ASSIGNMENT No. XIII.

The trial court's conclusion (Decision and Findings, Tr. Vol. 2, pp. 922-923) that specific performance should be denied because the parties were antagonistic, is erroneous and not supported in equity. Every suit for specific performance involves antagonism. This is no ground in equity for denying relief. The court erroneously concluded that this is a suit to enforce an agreement to form a partnership. The present suit is for a decree to compel the performance of an agreement to lease. Under the facts of this case, the plaintiff's rights may not be destroyed because of the association of a co-lessee, who is a son of the principal defendant, and who joined with his mother "for no cause" inequitably and unconscionably, to defeat plaintiff of his just rights.

ASSIGNMENT No. XIV.

The evidence and the findings establish conclusively that the defendants acted with the utmost bad faith. The equities are overwhelmingly with the plaintiff. The trial court's finding (*supra*) that the defendants repudiated the agreement without cause, is a plain conclusion that the agreement is still in full force and

effect. Why should not the defendants be compelled to perform? In support of the contention that the defendants acted with the utmost bad faith appellant refers to the evidence of all the witnesses, detailed extracts from which by page and number will be specifically designated later in this brief.

ASSIGNMENT No. XV.

The trial court erred in failing to conclude that the material and essential provisions to be contained in the lease were agreed upon with certainty, definiteness and completeness, and that it was the intention of the parties later to negotiate for minor, customary and subsidiary conditions "to fully effectuate the intent and purposes of the parties" to the contract. (Quoted part from Agreement, par. 10, Court's opinion. Tr. Vol. 2, p. 913, Par. 10.) That the contemplation of a formal lease did not destroy the completeness and certainty of the contract.

ASSIGNMENT No. XVI.

It was the plain duty of the defendant owner of the property to have submitted a form of lease to the plaintiff for his consideration, before her sudden repudiation of the agreement without good cause. The plaintiff was foreclosed by the unwarranted act of repudiation from his right, guaranteed by the agreement, to give consideration to any proposed terms to be embodied in the lease. The trial court by denying plaintiff relief by way of specific performance, erroneously deprived plaintiff of this right, in the face of

the court's finding that the agreement was still in full force and effect.

ASSIGNMENT No. XVII.

The plaintiff has no plain, speedy and adequate remedy at law. Damages may not be assessed for the admitted breach of the contract, because they are purely speculative. Damages may not be estimated for a new and untried business. The court, by its decree for defendants, erroneously deprived plaintiff of a remedy, and ignored the well established doctrine that "where there is a right there is a remedy."

ASSIGNMENT No. XVIII.

The plaintiff had already performed under the contract, before it was repudiated. He deposited ten thousand (\$10,000.00) dollars as an evidence of good faith. He conferred on plans for the building and made suggestions later approved and adopted. He negotiated for furnishings, which he was obligated to supply (Findings Tr. Vol. 2, pp. 917-918, Par. 11)—all of which was well known to the defendants. The defendants summarily refused further performance, without good cause.

ASSIGNMENT No. XIX.

The trial court has erroneously failed to take into consideration that the contract was definite and complete in all its material and essential terms; that it was the plain intention of the parties to be bound by these material and essential terms; that an agreement for a lease which contains the material and essential

terms is enforceable in equity by specific performance; and that it was clearly the intention of the parties to embody in the lease only such subsidiary and customary provisions "to fully effectuate the intent and purposes of the parties" as definitely and completely agreed upon.

ASSIGNMENT No. XX.

The trial court's dismissal of the plaintiff, in the light of the findings and the evidence, is inequitable, unconscionable and unjust.

THE FINDINGS OF FACT OF THE TRIAL COURT SUSTAIN EVERY MATERIAL CONTENTION OF PLAINTIFF-APPELLANT. THE DECREE FOR THE DEFENDANTS-APPELLEES IS AGAINST LAW, EQUITY AND GOOD CONSCIENCE.

The first specification of error assigned herein (supra) sets forth the material findings of the trial court, which undoubtedly sustain plaintiff-appellant's cause of action and entitle him to a decree of specific performance. These findings establish that there was a written contract between the parties; that the contract contained "terms which were settled and agreed upon by said agreement"; that there was a meeting of the minds as to these settled terms; that as to these settled terms, the contract was complete, certain and definite; that "all the parties treated and considered the agreement in full force and effect"; that the plaintiff-appellant "deposited Ten Thousand (\$10,000.00) Dollars with the defendant, Irene Gladys Mapes, *as a guarantee of good faith*, and which was accepted by

her as a full compliance with the provisions of the contract; that the defendant, Irene Gladys Mapes, upon the execution of the agreement was represented by an attorney at law; that "the contract under discussion here is *definite* as to description of the property to be leased, the term, the price of rental and the time and manner of payment"; and that the defendants repudiated the contract "*without good cause*". (Italics in this paragraph supplied.)

As strikingly significant as these findings are in establishing a complete, definite and certain agreement of the terms, covenants and conditions contained in it, the further observation may be here made, that these findings may be amplified by an analysis of the contract itself, which, beyond contradiction, proves conclusively that there was a complete meeting of the minds on all the material and essential terms, covenants and conditions to be contained in the lease. What these material and essential terms are, will be later enumerated herein in detail. Further, the defendant, Irene Gladys Mapes, testified that she fully understood these agreed terms and that she assented to them. (Tr. Vol. 2, pp. 458-464.) It therefore follows that the conclusions of the trial court in adjudging that the contract was incomplete, is inconsistent with the court's findings and the agreement itself, which establish conclusively that its material and essential provisions were definitely agreed upon, and that it was violated by the defendant, Irene Gladys Mapes, who wilfully and "*without good cause*" refused to tender a form of lease, which she was obligated in law

to do, and who deliberately broke her promise to negotiate for the subsidiary terms of the lease, which she had solemnly promised to do. The trial court upholds her in her illegal violation, and protects her in her concededly broken promise! Furthermore, though the plaintiff-appellant had fully performed, and though he was guilty of no breach, and though the time element has been waived by both parties, and though all parties treated the contract as in full force and effect, and though the plaintiff-appellant was led on in the belief that he would get a lease, the trial court dismisses him without remedy! Such a determination appears revolting to all principles of equity and fair dealing.

THE AGREEMENT ESTABLISHES A COMPLETE CONTRACT, AND A COMPLETE MEETING OF THE MINDS WITH DEFINITENESS, CERTAINTY AND FINALITY AS TO THE MATERIAL AND ESSENTIAL PROVISIONS TO BE INCORPORATED IN THE LEASE.

An examination of the agreement clearly discloses that the parties were in complete accord upon the material and essential provisions to be incorporated in the lease, as follows:

1. The parties to the lease.
2. The hotel to be leased.
3. The term of the lease.
4. The time for possession by the lessees.
5. The consideration or rental price to be paid.
6. The time of payment.

7. The furnishing and equipping of the hotel by the lessees as a first class hotel and apartment building.
8. The delivery of a chattel mortgage on all furniture, fixtures and equipment by the lessees to the lessor to secure the rental payment.
9. A guarantee by the lessees that the *total income from the entire building* will be in an amount at least sufficient to cover payments required of the lessor for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within said lease period.
10. A plain understanding and agreement, from the foregoing paragraph (9) that the lessor agrees to pay taxes, upkeep and insurance.
11. A definite, unequivocal, and plainly stated understanding and agreement that the lease shall contain the foregoing provisions to fully effectuate the intent and purposes of the agreement.

It will be noted from the above, that not only were the main essentials of the lease agreed upon, but the parties went further than that. The plaintiff-appellant was bound by the joint obligation with his co-lessee to furnish and equip the hotel as a first class hotel and apartment building; to execute and deliver a chattel mortgage thereon to secure the rental payments, and to guarantee that the total income from the entire

building will be an amount sufficient to cover payments required of the lessor for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of the building within the lease period. All of the main essentials and additional provisions were agreed upon without condition or qualification. There is nothing expressly set forth in the agreement that makes this accord contingent upon the happening of any future event. It was a definite and complete meeting of the minds on the essentials without any equivocation, and for which the plaintiff-appellant paid ten thousand (\$10,000.00) dollars as an evidence of good faith. As such, it was a completed contract; and though the parties agreed that they would negotiate further for the other incidental provisions to go into the lease, this did not destroy or effect the completeness and binding effect of the contract itself. The agreement bound the defendant, Irene Gladys Mapes, to further negotiation. This "without good cause" she refused to do. She wilfully and suddenly repudiated the contract; and the plaintiff-appellant was denied the privilege or benefit of further negotiation. She cut the plaintiff-appellant off from a right guaranteed him by the contract. In this suit, he seeks specific performance to compel the defendant Irene Gladys Mapes to perform in accordance with her solemn commitment. There is no indefiniteness or incompleteness or ambiguity about this commitment. Neither is there any indefiniteness nor incompleteness about the agreed provisions to go into the lease. The trial court has misconceived the binding force and effect of the contract.

THE PLAIN INTENTION OF THE PARTIES IS DISCLOSED BY
PARAGRAPH 10 OF THE AGREEMENT. (Tr. Vol. 2, p. 913,
Par. 10.)

Paragraph 10 of the agreement clearly shows the intention of the parties. This paragraph reads as follows:

“The said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected.”

It is manifest that the main concern of the parties was to arrive at a complete understanding and agreement as to the material and essential provisions of the lease. This they definitely and completely accomplished. Their next concern was to see to it that the lease contained “all necessary provisions *to fully effectuate the intent and purpose*” of the agreement “and also to definitely set forth all usual or necessary conditions to the end *that the rights and interests of each party shall be properly conserved and protected*”. This Paragraph 10 is manifestly an express written recital of the intent of the parties, and it is difficult to see how it may be overlooked or ignored. The only apparent rational interpretation of this paragraph seems to be that the parties intended that the lease was to contain such subsidiary provisions and “all usual or necessary conditions” so as to carry out the material and essential provisions already agreed upon. In a word, the lease was intended to follow the con-

tract and not to vary it. Further, the lease was intended to protect and conserve the "rights and interests of *each party*" as established by the agreement. It was never intended that the plaintiff-appellant was to receive no protection at all; that his good faith ten thousand (\$10,000.00) dollar deposit was a gratuitous advancement to be used at the pleasure of the recipient, and that the defendants at will, for no good cause or reason, could breach their solemn promises and cast out the appellant without right or remedy or relief. Neither was it intended that the contract, based upon negotiations and discussions, solemnly signed and witnessed by all parties, was a mere vagrant paper, to be torn up and disregarded by any party at will. This, in effect, is the conclusion reached by the lower court. But, it is respectfully submitted, that such a conclusion under a similar state of facts, is not sustained by other courts of high authority, as will be presently shown.

In a case for the specific performance of a contract, *West Heights Realty Corporation v. Adelman*, 152 Atl. 196, in which the contract provided that "the parties were to agree thereafter upon very important provisions, about which, the result demonstrates, they would be extremely liable to disagree." The following defenses in part were set up: namely, that the contract was too uncertain to be enforced by specific performance, and that the contract

"Contemplated that before any lease or agreement should be in fact executed, there should be a further agreement between the parties, and terms

to be inserted in said lease were to be agreed upon that no such terms agreed upon in writing as required by the statute of frauds, and no completed agreement in writing or a memorandum of which is in writing has been made between the parties.”

Ibid. page 198, paragraphs 3, 4.

The court overrules this defense in the following language:

“This defense, according to the argument of counsel for the defendant, is based upon the first of the two paragraphs near the end of the contract set forth above. It is argued that this paragraph of the contract provided that, in addition to the numerous minute provisions contained therein, the parties were to agree thereafter upon very important provisions, about which, as the result demonstrates, they would be extremely liable to disagree. This construction of the clause under consideration of course emasculates the whole contract and renders it unenforceable either at law or in equity. The result would be that these men met and negotiated for nine hours continuously, had their agreement in regard to the lease, so far as they had reached any, not merely noted down for reference upon a further conference for the continuation of the negotiation, but put in the form of solemn agreement in writing executed by them, and that all this labor was a nullity * * * that either party by failure to agree upon other terms to be discussed in the later proposed conference would have the absolute power to render null and void all that had taken so much time to negotiate and embody in a written contract.”

“Such a construction in my judgment should be avoided if a meaning which would not invalidate the whole agreement can be fairly ascertained and placed upon the language in question.”

The court further comments that this defense

“Seems to amount to a plain declaration that the entire contract was invalid in law and in equity; was a vain form; and that neither party acquired any rights of any kind under it.”

The court concludes (p. 205) that the complainant is entitled to a decree of specific performance. The opinion of the Advisory Master in this case was affirmed by fourteen justices of the Court of Errors and Appeals of New Jersey, with no dissents.

In the case of *Bondy v. Harvey*, 62 Fed. (2d) 521, an agreement was entered into for a lease, which further provided that the lease should contain all of the usual and formal clauses “*to the mutual satisfaction of the parties hereto.*” The defense was interposed that the contract was indefinite and incomplete because it provided that a lease to be drawn later was to contain clauses to the mutual satisfaction of the parties. The lower Federal Court sustained this contention, but was overruled by the Circuit Court of Appeals, Second Circuit. In the course of the opinion, the Circuit Court of Appeals (p. 523, paragraphs 5, 6) used the following language:

“The phrase ‘to the mutual satisfaction of the parties’ was held below to render the contract indefinite, a mere agreement to agree, and there-

fore unenforceable. But the contract is not indefinite. As stated above, the terms agreed upon are particularized and sufficient to constitute a valid lease. The phrase 'all the usual and formal clauses' we think was intended to state generally such clauses as the forfeiture, peaceful possession, warranty, surrender, re-entry, and other clauses which are familiar in leases. 'Mutual satisfaction' might be said to mean that the specified clauses should satisfy the parties, but in this thing nothing was left open to be agreed upon by the parties. The parties evidently thought they were bound by the contract. The 'Articles of Agreement' do state a contract between the parties. Details of familiar covenants, which as are usual in leases as protection for the parties, might well be left open for further specification without destruction of the contract or denial of remedy thereunder. (*Adamson v. Alexander Milburn Co.*, 275 F. 148 (C.C.A. 2); *Weed v. Lyons Petroleum Co.* (D. C.) 294 F. 725; *N.E.D. Holding Co. v. McKinley*, 246 N.Y. 40, 157 N.E. 923; *Ansorge v. Kane*, 244 N.Y. 395, 155 N.E. 683; *Newburger v. Amer. Surety Co.*, 242 N.Y. 134, 151 N.E. 155. These cases permit a reasonable interpretation that the parties impliedly understood their agreement to incorporate such usual and formal clauses as are put in leases when the lease is finally drawn. As said in *United States v. McMullen*, 222 U.S. 460, 472, 32 S.Ct. 128, 131, 56 L. Ed. 269: 'The power to change details, reserved by the United States, did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper.' The primary object of the court always is to find the intention of the parties

as expressed in the agreement, and, if the parties place it in the power of the draftsman to state the usual and formal clauses, it is expected that this formality would be done to the reasonable satisfaction of the parties. In order to defeat the contractual obligations, it must appear that the terms omitted were so essential to the contract that it would be unfair to enforce the remainder. *Palmer v. Acolian Co.*, 46 F. (2d) 746 (C.C.A. 8); *Cohen & Sons v. Lurie Woolen Co.*, 232 N.Y. 112, 133 N.E. 370.”

Later on in the opinion (p. 524), the court observes further in the following language:

“Nor may a party be permitted to be arbitrary in entering into a lease for which he has contracted as here. The burden we have here is to find out whether the parties have reserved the right to be arbitrary or whether they have such right for a reasonable satisfaction controlling upon both contracting parties. We think that we should construe ‘mutual satisfaction’ as reasonable satisfaction and thus uphold the contract. The specific covenants were detailed by the parties.”

In the case of *Adamson v. Alexander Milburn Co.*, 275 Fed. 148 (C.C.A. 2), the contract provided that it should be subject to an agreement between attorneys as to “the breadth and patentability of the claims”. The trial court held that this condition rendered the contract incomplete and unenforceable, but the Circuit Court of Appeals reversed, and remanded the cause with direction to reinstate the complaint.

It will be observed in the case above cited that the court advocated a recognized principle "that where something is to be done to the 'satisfaction' of a particular person, and it is not simply a matter of personal taste, fancy or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be arbitrary or unreasonable, a simple allegation of dissatisfaction without a good reason is no defense." (Ibid. p. 157.) The case at bar presents a stronger state of facts. Here, the breaching contracting parties arbitrarily refused "without good cause" to confer or negotiate *at all* for the subsidiary terms of the lease. They arbitrarily closed the channels of negotiation, without giving the plaintiff-appellant a chance even to consider any suggestions or propositions. It further follows, in the light of the above authority, that there was every reason for reaching an accord, because of the established principle that all demands must be in law and equity reasonable and not arbitrary. The trial court (Tr. Vol. 2, p. 917, Par. 9) in expressing a doubt that the plaintiff-appellant would agree to suggestions or propositions from the other side, overlooked its own function as a court of equity to see to it that fairness and reasonableness were invoked. That equity courts have this power, and that its exercise has been prescribed as a duty, will be later shown by authority. As a matter of evidence, the record in this case overwhelmingly establishes, that up to the time of the sudden repudiation, all of the parties by word, acts and conduct firmly demonstrated that in their mutual belief the lease was a mere formality to effectuate the express conditions of the contract.

MAY LITIGANTS WITH UNCLEAN HANDS SEEK AND RECEIVE FAVORS FROM COURTS OF EQUITY? ARE THEY ESTOPPED FROM RELYING UPON DEFENSES FOUNDED UPON BROKEN PROMISES AND UNFAIR DEALING?

As has been repeatedly stated in this brief, the trial court found that the defendants repudiated the agreement "without good cause." No stronger pronouncement of the grievous wrong inflicted by the defendants upon the plaintiff-appellant could be made. Besides this, continuously, up to almost the very date of repudiation, the defendants, by word, act and conduct, led the plaintiff on to the belief that a lease would be granted. The trial court makes a finding, bearing upon this contention, in the following language:

"that between the date of the execution of the agreement and April 10, 1946, the defendants, or either of them, did not by word, act or conduct, inform the plaintiff that they would not enter into and execute a lease on the said premises."

(Findings, Par. 10, Tr. Vol. 2, p. 917.)

The implication from this finding undoubtedly is, that by failing "by word, act or conduct" to inform the plaintiff that they would not enter into and execute a lease on the said premises, the defendants led him to believe that they would. This conclusion is reinforced by another finding of the trial court (same *ibid.*, Par. 10, Tr. Vol. 2, p. 917) that from the date of the execution of the agreement up to April 1, 1946, the defendants "treated and considered said agreement in full force and effect". If there may be anything further needed to establish the deception and unfair dealing of the defendants in leading the plaintiff on,

it may be found in the uncontradicted evidence of two of the main defendants themselves, and of the builder and contractor. These defendants evidenced so much confidence in the ability, integrity and financial influence of the plaintiff-appellant that they accepted his aid in procuring a loan to finance the construction of the building. This again, is established by the findings (Findings, Par. 5, Tr. Vol. 2, p. 916) as follows:

“That plaintiff did attempt to assist in the procuring of a loan for the purpose of financing the construction of the contemplated hotel building by interviewing the officials of a bank and insurance company.”

They sought his help and influence in attempting to acquire a twelve foot strip from the City of Reno as a part of the hotel site. (Tr. Vol. 1, p. 510.) They accepted his counsel and suggestions as to changes in plans for the hotel. (Tr. Vol. 1, p. 337.) They caused to be published in local newspapers feature articles, announcing him as the co-manager of the hotel. (Tr. Vol. 2, p. 643.) They wrote him friendly letters asking his aid to purchase bricks for the hotel. (Tr. Vol. 2, p. 637.) They knew that he was part-performing under his agreement in arranging plans for furnishing the hotel and they themselves actively participated in such negotiations. (Tr. Vol. 2, p. 659.) Besides all this, they accepted and retained, as an evidence of good faith, ten thousand (\$10,000.00) dollars in cash which he had turned over to them, and which entire amount was to be forfeited in the event “*after said lease is executed*” there was failure in furnishing the

hotel and giving a chattel mortgage. (Agreement, Par. 8; Tr. Vol. 2, p. 912.) He sold another hotel, to devote his time and energy to this new enterprise. (Tr. Vol. 1, p. 263.) Is there any other conclusion to be reached in the face of these record facts, but that the defendants led the plaintiff-appellant on to a belief that he would get a lease, that the written agreement was binding and complete, that their sudden and unwarranted repudiation was little short of an outrage against fair dealing, and that their plea here, before a court of equity, to be sustained in their wrongful conduct, should be condemned as a gross affront to all established principles of equity and justice? May a litigant come before a court of equity, confess a solemn contractual relation, upon which he led the other party to rely, arbitrarily breach it "without good cause" and expect condonation and approval? Do equitable maxims demand fair dealing by *all* parties, or are the requirements so one-sided that the "unclean hands" of defendants may besmirch the very courts that boast of cleanliness and justice? Should defendants be estopped from setting up defenses founded upon broken promises and dishonor? These are queries which have been answered by the courts; and it seems clear that no premium has been put upon double-dealing and dishonesty.

EQUITABLE ESTOPPEL. THE DEFENDANTS WERE ESTOPPED FROM SETTING UP THEIR OWN WILFUL BREACH OF CONTRACT AS A DEFENSE.

Williston on Contracts and *Pomeroy on Equity Jurisprudence* declare the rule of equitable estoppel as follows:

“It is more than a rule of evidence, it establishes rights, and is based upon the grounds of public policy and good faith. It prevents injustice by denying to one the right to repudiate his acts and representations to the detriment of another relying thereon.”

Williston on Contracts, Section 1508, citing *Wright v. The Farmers National Grain*, Circuit Court of Appeals, 7th Circuit, 74 Fed. (2d) 425.

“Equitable estoppel is, therefore, a particular doctrine, based upon justice and conscience, which is the origin wherever it may be invoked, of primary rights of property or of contract.”

Pomeroy Equity Jurisprudence, Volume 3, page 179, Section 802.

“Equitable estoppel in the modern sense rises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives, equity and fair dealing, to

create and vest opposing rights in the party who obtains the benefit of the estoppel.”

Ibid., Section 802, page 180.

“Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity from asserting rights which might perhaps have existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.”

Ibid., Section 804, page 188.

In the case of *Halsey, et al. v. Robinson, et al.*, 122 Pac. (2d) 11, the Supreme Court of California, invoking the doctrine of estoppel, made the following pertinent ruling:

“In view of our conclusion that the trial court was correct in finding that the plaintiffs were estopped to deny the validity of the June 7 writing, no further consideration need be given to plaintiff’s contention that it was the intention of the parties to reduce their contract, (the letter of June 7th) to a more formal writing before being bound thereby * * * and having failed to do so there was no contract which could be enforced. As reflected by the findings of the trial court, the facts of this case which give rise to an estoppel afford no basis for the application of the rule of law which was embodied in that contention.”

“Nor, in the light of the trial court’s ruling as to estoppel, is it necessary to give consideration to the plaintiff’s contention that there was no memorandum of the agreement to execute a lease sufficient to satisfy the statute of frauds.”

Citation from page 13.

In a case decided by the New York Appellate Division and affirmed by the Court of Appeals, the doctrine of equitable estoppel was invoked in a somewhat similar case to the case at bar. An injunction was granted to prohibit a play being produced in England. The authors of the play had made an alleged contract to allow the play to be produced in England, but if a certain producer did not produce the play then the authors were to select a producer. The authors had treated the contract as binding. Later on they refused to select a producer and held they were not bound by the contract. The court held that they could not defeat the contract by failing to select a producer, and by treating the contract as binding they could not later disaffirm it. The findings of the lower court are very similar to the findings in the case at bar. Finding No. 49 in the case cited was that both parties treated the contract as in existence. Finding No. 50 established that the parties were allowed to enter into the contract without any notice that the contract would be disaffirmed. Finding No. 51, as in the instant case, was that the parties had waived the time element. It also appeared that a dispute other than the contract in question was the cause of the trouble. On page 216 of the citation noted hereunder, the court said:

“We are not concerned with the merits of that dispute (referring to a dispute outside of the contract in question) which were not in issue here. Certainly it afforded neither justification nor excuse for the repudiation by the authors of the contract which they had treated as continuing and to continue thereafter for a reasonable time, and which by their acts, writings, and representations they had induced the manager to regard as equally existent for the protection of his rights as of their own. The interference of their lawyer in the situation cannot relieve the authors of their responsibility under a situation which they had largely helped to create, nor destroy the effect of their acts, which had estopped them from denying the existence of a contract, to be performed within a reasonable time, at least, in reliance upon which the manager acted, made his own contract with the British producers, and embarked his own funds in the venture.”

Nichols v. Hurtig and Seaman Theatrical Enterprises, 217 N.Y. Sup. 191, 217 App. Div. 117. Affirmed 157 N.E. 853.

The doctrine has been applied in preventing a person from asserting a constitutional protection:

“No principle has become more firmly established in the field of constitutional law than the fact that a person may effectively by acts or omissions waive a constitutional right to the protection of which he would otherwise be entitled, provided waiver does not run counter of public policy or public morals. This is nothing more than the equitable doctrine of estoppel applied in the realm of constitutional law and is uniformly up-

held in cases where the constitutional provision is solely protective of property rights."

Wilson v. The School District, 195 Atl. 90, 113 A.L.R. 1410, citation from page 1413.

In this, the Ninth Circuit, the doctrine was applied so as to prevent a right of forfeiture under a contract. This Honorable Court held that a party was estopped from asserting a right of forfeiture inasmuch as he had led the other party to believe forfeiture would not be exercised.

The Pokegana Sugar Pine Lumber Company v. Klamath Lumber and Improvement Co., 96 Fed. 34.

The Supreme Court of the United States held in a case in which there was a contract to discharge a mortgage if the mortgagor could construct a mill of a certain size, that a party to the contract was estopped to assert his contract right after a mill of a different size was constructed with the knowledge of the mortgagee defendant. The court announced the rule as follows:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain v. Seaman, 19 L. Ed. 554, citation from 560.

In a case in the Sixth Federal Circuit there was involved a contract for commission for the sale of

machines which would be sold in Italy. The defendants knew that the plaintiff had misconstrued the contract, but did not inform him of a proper construction. The court held they were estopped to deny the proper construction of the contract.

Letta v. Cincinnati Iron and Steel Co., 285 Fed. 707 (1922).

In another case decided in this Ninth Circuit, the plaintiff held a deed of trust on an insolvent company, with the right to foreclose if a receiver were appointed. A receiver was appointed and allowed to handle the company for three years, paying certain sums to the plaintiffs. It was held that the plaintiffs, due to their actions by not exercising the right of foreclosure within the three years, were estopped to foreclose.

First Federal Trust Co. v. First National Bank (Ninth Circuit), 297 Fed. 353.

See also:

Forstall v. Alberto, 24 Fed. 379;

Dickerson v. Colgrove, 25 L. Ed. 618;

Conway National Bank v. Pease, 82 Atl. 1068;

Forsyth v. Day, 46 Maine 176;

Horn v. Cole, 51 N. H. 287, 12 Am. Reps. 1011;

In re Shumaker, 121 Atl. 510;

The P. V. & K. Coal v. Kelly, 191 S.W. (2d) 231;

McSweeney v. The Equitable Trust Co., 22 Atl. (2d) 282;

White v. Ralph, 154 Pac. (2d) 167;

Medico Dental Building Co. v. Horton & Converse, 124 Pac. (2d) 56.

THE SOLEMN PROMISE OF THE DEFENDANTS TO NEGOTIATE WAS A CONDITION PRECEDENT WHICH THEY MAY NOT SET UP AS A DEFENSE IN THE FACE OF THEIR CONCEDED WILFUL REPUDIATION.

The provision in the contract providing for further negotiations is a condition precedent, in view of the fact that it was a condition existing after the formation of a contract, but precedent to the duty of performance. The findings of fact in this case establish that the contract which was repudiated without cause was in full force and effect from September, 1945 to April 10, 1946, the date of its repudiation. Therefore, a true condition precedent is disclosed.

The *Restatement of Contracts*, Section 250, defines a condition precedent:

“In a restatement of this subject, ‘condition’ is according as the context indicates, either a fact (other than mere lapse of time) which, unless excused as stated in sections 294-307, (a) must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a ‘condition precedent,’ ”.

Comment (c) under Section 250, *Restatement of Contracts*, says:

“The nature of the promisor’s duties involves further distinction. A duty arises whenever a contract is made. This duty is called absolute as nothing but lapse of time is necessary to make immediate performance by a promisor obligatory, since though time must elapse before performance need be rendered, lapse of time is not usually called a condition and is not so designated

in the restatement of this subject. The duty is conditional when an event other than lapse of time must happen in order to make the duty one of immediate performance."

Williston on Contracts stated the rule as follows:

"Generally in contracts, when reference is made to conditions, what is meant are conditions which become operative after formation of the contract and qualify the duty of immediate performance of a promise or promises thereunder—not conditions which qualify the existence of a contract or promise."

Williston on Contracts, Revised Edition, Volume 3, Section 666, page 1911.

THE DEFENDANTS MAY NOT RELY ON THE CONDITION PRECEDENT BECAUSE OF THEIR WILFUL FAULT AND BREACH.

A condition precedent may not be invoked if the promisor is at fault.

"Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability.

13 *C. J.* Section 722, Subsection 2, page 648.

“One who prevents or makes impossible the performance or happening of a condition precedent on which his liability and by the terms of the contract is made to depend, cannot avail himself of his non-performance. In other words, he who prevents a thing from being done shall never be permitted to avail himself of the non-performance which he, himself has occasioned.”

12 *Am. Jur.* Section 329, page 885.

“One who prevents the fulfillment of a condition precedent, or its performance by the other party, may not take advantage of his act, and the performance of the condition is excused.”

“Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents the fulfillment of a condition precedent or his performance by the adverse party, he cannot rely on such condition to defeat his liability.”

17 *C.J.S.* Section 468b, page 969.

“If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise and a condition would have occurred, or the performance of a return promise been rendered except for such prevention or hindrance, a condition is excused.”

Restatement of Contracts, Section 295.

“But when it is said that a condition is excused, it is meant that the liability of the promisee

arises in spite of the non-performance of the condition.”

Williston on Contracts, Revised Edition, Volume 3, Section 676, page 1951.

“It is a principle of fundamental justice that if the promisee himself is the cause of the failure of performance, either of an obligation to him or of a condition upon which his own liability depends, he cannot take advantage of the failure.”

Ibid, Section 677, page 1952.

The following case supports the above stated principle:

Baumer v. The Franklin County Distilling Co.,
135 Fed. 2nd, 384, 6th Circuit, 1943. Certiorari denied, 64 Supreme Court 54, 320 U. S. 750, 88 L. Ed. 446.

This was a suit for the breach of a contract where the plaintiff had contracted for the right to sell two of the defendant's brands of liquor. After the contract had been performed for a short time, the defendant sold their rights of manufacturing one of the brands to a third party. Defendant argued they were no longer liable under the contract inasmuch as their manufacture of the liquor was a condition precedent to the liability under the contract. The court held at 135 Fed. 2nd. 389, quoting several Ohio cases:

“ ‘Where the obligations arising under a contract have attached, and subsequent thereto one party without the consent of the other does some act or makes some arrangement which prevents carrying out of the terms of the contract according to its terms, he cannot avail himself of this conduct to avoid his liability to the other party’ ”.

“Even where the liability depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.”

Bellingham Securities Syndicate v. Bellingham Coal Mines, 125 Pac. 2nd. 668, 13 Washington 2nd, 370, 1942. This was an action for the collection of royalties in the operation of coal mine. The contract held that no royalties would be paid unless the defendants' net current assets were of a certain amount. The defendants had depleted their assets by the wrongful payment of dividends, and the defendants claimed there was no liability to pay the royalties since the condition precedent did not exist. The court said at page 680:

“As respondent has made impossible a performance of a condition precedent upon which its liability, by the terms of the lease agreement, is made to depend, respondent cannot avail itself of its own non-performance; in other words, respondent may not invoke such condition to defeat its liability.”

Thatcher v. Darr, 199 Pac. 938, 27 Wyo. 452, 1921. Here the defendant agreed to purchase the stock of an association provided patent to certain lands were issued to the association. The defendant alleged he was not liable under the contract on the ground that a patent on only a portion of the land was issued. The court found that the defendant had made complete performance of the condition impossible, and at 199 Pac. 947 the court said, quoting various cases:

“ ‘He who himself prevents the happening or performance of a condition precedent, upon which his liability, by the terms of the contract, is made to depend, cannot avail himself of his own wrong and relieve himself from his responsibility to the obligee, and shall not avail himself, to avoid his liability, of a non-performance of such precedent condition which he has himself occasioned, against the consent of the obligee. It seems clear that where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event, that he will hold himself in readiness to cooperate where his cooperation is a necessary element in the happening of the contingency. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute, and must be performed as if the event had occurred.’ ”

“ ‘That a party to a contract, who by his own act prevents the happening of a condition, is estopped thereafter to see that such condition has not happened, no party to a contract can interfere to prevent the performance of any condition, and then claim any benefit or escape any liability for the failure of such performance.’ ”

See also:

Hayes v. Beyer, 278 N.W. 764, 284 Mich. 60;

Greenberg v. Sakwinski, 211 Mich. 498, 178 N. W. 234;

Foreman State Trust & Savings Bank v. Tauber, 180 N. E. 827, 348 Ill. 280.

SPECIFIC PERFORMANCE WILL BE GRANTED WHERE THERE IS A CONDITION PRECEDENT, AS HEREIN ESTABLISHED.

“A fact or event may be operative as a condition precedent or a condition subsequent by the specific words of the contract, by reasonable implication of the fact, or by construction of law for purposes of justice * * *. *This is the case, whether the remedy sought in an action is damages or specific performance.* Further, a performance of such a condition may be excused, or its actual occurrence be made inoperative, by reason of the conduct of the party in whose favor it is intended to operate * * *. *Again, this is true whether the remedy sought is damages or specific performance.*” (Italics supplied.)

Restatement of Contracts, Sec. 374, Subsection 1.

“Whenever, also, the plaintiff’s delay or default in performing the terms and conditions on his part, at the time specified, *is caused by the defendant’s own neglect, laches, or other conduct*, such omission will not be a ground for refusing the relief which he (the plaintiff) asks no matter how express may be the provision of the contract requiring a punctual performance and making it essential; a defendant cannot rely as a defense upon a breach which he himself has caused.”

Pomeroy’s Specific Performance of Contracts, Third Edition, Section 337, page 738;

Tyson v. Tyson, 149 Pac. 2nd. 674, 676;

The Hydraulic Power Co. v. Pettibone Cataract Paper Co., 183 N. Y. Sup. 373, 385.

The last cited was affirmed on appeal and the following statement was made:

“But if the actions were for specific performance it does not follow that a court of equity would be powerless to grant relief. The grant of the easement right is definite and certain. It is created by the contracts as of the time of the execution thereof. It is only in preservation of the equities of the defendants that detailed provision is embodied touching the manner of the use of right so created. The provisions for the functioning of the engineers conference all look to minimizing the injury to the defendants, and such do not serve to defeat or cut down the completeness or full benefit of the grant. All such relate to the manner of enjoyment and nothing more.”

“Under such circumstances, these provisions which it is asserted create indefiniteness, defeating specific performance, are not of the essence of the contract, but are collateral thereto, and such doctrine has been repeatedly approved by the courts * * *.”

“They (the defendants) repudiate the contract and seek, in these provisions as to enjoyment to find sufficient indefiniteness to defeat the entire instrument. Such efforts must fail. *The defendants have breached their contract in these particulars, and they cannot be heard in a court of equity to assert their own breach in support of claimed invalidity flowing therefrom * * *.*” (Italics supplied.)

If it were essential to relief in this action, no doubt, the court of equity could, by mandatory provision, compel the defendants, even now, to select an engineer and participate in conferences as contemplated by the contract.”

Ibid, 191 N. Y. Sup. 12, Citation from p. 16.

THE CONTRACT CONTAINS THE MATERIAL AND ESSENTIAL PROVISIONS OF THE LEASE AND IS ENFORCEABLE IN EQUITY BY SPECIFIC PERFORMANCE.

“An agreement which describes the premises sufficiently to identify them, which specifies the lessor and the lessee, and which fully designates the term and the amount of rent to be paid, is sufficiently complete.”

35 *C. J.* 1202, Sec. 521 and authorities cited.

“It may be proper to decree specific performance of an agreement to enter into a contract, or an informal agreement, even though the parties contemplated the subsequent execution of a formal contract. This is true where the agreement contains the essential terms.”

58 *C. J.* 941 and authorities therein cited.

“There is no disagreement whatsoever regarding the date of the commencement of the terms, the duration of the lease, the rental to be paid, when payable, and the specific description of the premises demised. These are all fully understood and agreed upon by the parties. It seems to follow, then, that as to the real necessary and material elements of the lease, the agreement is clear, definite, and complete, and upon these the parties seem to have been of one mind and the lower court in no doubt.”

“This brings us to the real or main matter of controversy in this case, which is that, where the material elements of the agreement to lease are definitely agreed upon, that the contract is silent as to the general, usual, and ordinary covenants and conditions, can such a contract be enforced

by specific performance? In other words, are these covenants and conditions to be implied in law, or must they be definitely set forth in the agreement in order to be inserted in the lease by a decree of a court of equity? *While the contract provides 'that a lease shall be executed covering the agreement between the parties hereto as to said building', it is silent as to the usual conditions, covenants and other general provisions contained in an ordinary lease.*"

"From an examination of the recognized text-books and the adjudicated cases, it appears that it has long since been the settled law, that, where there is no specification in the contract to execute a lease covering the usual, ordinary covenants and provisions, these will be implied by the courts of equity. * * *"

"This rule of law is recognized with some exceptions by the courts of this country. In 36 Cyc. 792, general principle of construction is briefly stated thus: 'A contract to execute a lease calls for a lease with the usual covenants.' "

"The annotator of L.R.A. states the rule to be 'specific performance of an agreement for a lease will be decreed with such covenants as are usual or incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect'. Note in 20 L.R.A. 36."

Bennett v. Moon, 31 A.L.R. 495, citation from pages 499-500.

Attention is respectfully called to the annotation following the case just cited, which firmly affirms and reinforces this principle.

“Can it then be said that the agreement to lease is so incomplete or uncertain as to make it impossible to decree specific performance? There is no uncertainty as to the names of the parties to the lease: there is no indefiniteness as to the description of the premises leased; no uncertainty as to the length of time the lease is to be enforced, nor as to the annual rentals, nor as to the amount to be paid in case of sale * * *. However, as the agreement to lease sets forth definitely in our opinion all the essential requirements of a lease, (see *Cochrane v. Justice Min. Co.*, 16 Colo. 415, 26 Pac. 780; *Jones, Landlord and Tenant*, Section 137A; *Tiffany, Landlord and Tenant*, Section 66), it cannot be said, because other and different covenants might have been agreed upon, that what in fact has been provided for is too uncertain and indefinite to permit of specific performance.”

“We are of the opinion that the agreement, standing by itself, is a complete contract, certain in its terms, and satisfied the statute of fraud.”

Bushman v. Faltis, 150 N. W. 848, citation from page 851.

“Under the authorities, to create a valid contract of lease, but few points of mutual agreement are necessary: First there must be a definite agreement as to the extent and bounds of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and time and manner of payment. *These appear to be the only essentials*; the others, such as the covenant for the peaceful possession on the part of the lessor, diligent, proper, workmanlike, and

continuous working with a view to best results, both present and prospective, on the part of lessee; and where, as in this case, the rental is a share or a percentage of the profits, the disposition of the ore to the best advantage, the keeping of accurate and honest accounts, and making honest returns, are secondary and implied covenants growing out of the principal agreement." (Italics supplied.)

Cochrane v. Justice Mining Co., 26 Pac. 780, citation from 780-781.

"Plaintiff's theory of the case is that the agreement herein set out was an agreement to make a lease in the future and not a lease. It appears to us that the agreement contains all the essentials of a valid lease. To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. Jones on Landlord and Tenant, p. 170, 137a; *Cochrane v. Justice Min. Co.*, 16 Colo. 415, 26 Pac. 780; *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715. However, plaintiffs' contention is based upon testimony of an understanding between the parties that they were later to execute a more formal contract. Whether an instrument is a lease in praesenti or an agreement to execute a lease in future is largely a question of the intention of the parties. *Jackson v. Kisselbrook*, 10 John. (N. Y.) 336, 6 Am. Dec. 341; *Pac. Imp. Co. v. Jones*, 164 Cal. 260, 128 Pac. 404. Nevertheless, where the parties have agreed upon all essential

facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. Jones on Landlord and Tenant, *supra*; Marcus v. Collins Bldg. & Const. Co., 27 Misc. Rep. 784., 57 N. Y. Supp. 737. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material. Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 74."

Levin v. Saroff, 201 Pac. 961, citation from pages 962-963.

See also

Bournique v. Williams et al., 225 Ill. App. Court Reports. page 12.

"A fundamental rule of this branch of equity jurisprudence is that whenever a contract concerning real property is, in its nature and incidents, entirely unobjectionable—that is, when it possesses one of those features which appeal to the discretion of the court—it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it. *Slattery v. Gross*, 96 Or. 554, 559, 187 Pac. 300, 190 P. 577; Restatement of the Law of Contracts, Section 360; 5 Pomeroy, Equity Jurisprudence 4869, Section 2167. A lease being a conveyance of an interest in land, there would seem to be no good

reason for withholding application of this rule to a contract of that character."

Temple Enterprises v. Combs, 128 A. L. R. 856,
citation from page 871.

The above case indicates a family relation, as does the instant case. In commenting upon this relation the court states:

"We are not unmindful of the difficulties that stand in the way of performance by this 'house divided against itself'; but they are difficulties, not of Keller's making, but created by the defendants, and as we think, without legal justification. Equity would be a misnomer if a court assuming to exercise equitable powers should allow wrongful conduct to be used as a weapon of defence against one invoking its aid."

Supra, page 872.

"Specific performance of an agreement for a lease will be decreed with such covenants as are usual and incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect. *Henderson v. Hay*, 8 Bro. Ch. 632; *Morgan v. Slaughter*, 1 Esp. N. P. 8; *Folkingham v. Croft*, 3 Anstr. 700; *Vere v. Loveden*, 12 Ves. Jr. 179; *Jones v. Jones*, Id. 186; *Church v. Brown*, 15 Ves. Jr. 258; *Robinson v. Cleator*, Id. 526."

Note to 20 L. R. A., page 36.

In the case of *United States v. City of New York*, 131 F. 2nd. 909, (8th Circuit), which was a suit for specific performance of a contract, the court on page 915 declared as follows:

“It is enough for the purpose of deciding that the contract expressed a final binding agreement that the parties set forth and agreed to all but the comparatively insignificant details as to which they were bound to reach a reasonable understanding if and when they should require attention.”

THE CONTEMPLATED LEASE IS AN INTEREST IN LAND AND THEREFORE EQUITY WILL ENFORCE SPECIFIC PERFORMANCE ALMOST AS A MATTER OF COURSE.

In the case of *Temple Enterprises v. Combs*, 100 Pac. 2nd. 612, 128 A. L. R. 856 (supra) the court declared as follows:

“We think, also, that the jurisdiction of equity is properly invoked because the plaintiff’s damages would be difficult to ascertainment and that remedy would not, therefore, be as complete and adequate to accomplish the ends of justice as the remedy of specific performance (Rest. of the Law of Contracts, Section 361); and ‘then too the lessee has a right to the land, and is not required to accept damages.’ *F. E. Norman Co. v. E. I. Dupont DeNemours and Co.*, Supra (12 Del. Ch. 155, 108 A. 746).”

The *Norman* case, cited above, states on page 746 thereof:

“It is almost a matter of course that a court of equity will enforce specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract is not an adequate remedy. Agreements to get or renew a lease are frequently enforced.”

Section 360 of the *Restatement of Contracts* states in part:

“Damages are regarded as an inadequate remedy for the breach of a promise (a) to transfer any interest in specific land * * * and specific performance will be decreed subject to the rules stated in Sections 359-380.”

Under comment on the above section it is stated:

“The remedy in money damages for breach of a contract for the transfer of a specific tract of land is regarded as inadequate without regard to quantity, quality or location. A specific tract is unique and impossible of duplication by the use of any amount of money. Specific performance is available to enforce a contract, *the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple.*” (Italics supplied.)

A lease is a recognized interest in land in the State of Nevada. Section 1545 N. C. L. 1929, as construed in the case of *Adams v. Smith*, 19 Nev. 259, 272, 3 Am. State Reps. 888, 9 Pac. 337, establishes that a leasehold interest is an interest in land.

“Jurisdiction in equity to compel specific performance of a contract for the sale of land is firmly established; and the inadequacy of the remedy at law for damages need not be shown; it will be presumed as a matter of law.”

91 Fed. Rep. 2nd, page 122, citation from page 124.

Many authorities from Federal and State jurisdictions are cited in the footnote in support of this principle.

“It is almost a matter of course that a court of equity will enforce a specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract is not an adequate remedy.”

F. B. Norman Co. v. E. I. Dupont DeNemours and Co., 108 Atlantic Reporter 743, citation from page 746.

DAMAGES BY WAY OF PROFIT FOR THE PREVENTION OF OPERATION OF A NEW BUSINESS ARE TOO SPECULATIVE AND REMOTE TO BE RECOVERED IN A SUIT AT LAW.

The general rule as to a new business is laid down in 17 C. J., page 797, Section 18:

“Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.”

Where there is a denial of recovery the reason most frequently relied on is that the lessee's business is not an established one.

In *Hodges v. Fries*, 16 So. 682, the plaintiff was to open a millinery business but anticipated profits were disallowed as too remote, speculative and contingent.

The plaintiff rented premises for the purpose of conducting a barber shop in *Leslie E. Brooks Co. v. Long*, 64 So. 452, but failed to obtain possession. In denying profits the court said:

“The general rule applicable in such cases is that the lessee can recover from the lessor, for breach of contract to deliver possession of the leased premises, the difference, if any, between the rent contracted to be paid and the actual value of the premises. Prospective profits from the business that the lessee expected to conduct in said premises are too remote and speculative, dependent upon too many contingencies to be permissible as an admeasurement of damages in such a case.”

The distinction between the established and unestablished business is well shown in *Favar v. Riverside Park*, 144 Ill. App. 86, an action for damages for failure to deliver possession of an amusement park concession:

“The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved to be paid by the lease. The same rule applies to a farm, a dwelling house, a hotel or business premises. The rule is varied in the case of an established business, in which case the measure of damages would be the difference between the rent and the value of the lessee’s business, which would necessarily include an allowance for profits.

“But if the business were a new one, there could be no recovery for profits, and in that case the measure of damages would be restricted to those recoverable under the first rule recited. The profits which appellee might have made had she installed her show in appellant’s park are purely speculative.”

**MORE AS TO THE ERRORS OF THE TRIAL COURT IN
AVOIDING THE ABOVE ESTABLISHED PRINCIPLES.**

While the trial court apparently conceded the law as established by the last cited above authorities, it erroneously concludes that the doctrine does not apply here because in the instant contract "there is here a definite provision that further negotiations were to be had and that no lease was to be executed except as a result of the required further negotiations." (Tr. Vol. 2, p. 921.) The trial court ignored its own findings in that,

1. There was a complete and definite contract as to the material and essential provisions to be embodied in the lease. (See the trial court's opinion, Tr. Vol. 2, p. 921.) The trial court's opinion holds "that the contract under discussion here is definite as to the description of the property, the term, the price of rental, and the time and manner of payment." (Ibid., p. 921.) These are the material and essential elements, which under the authorities "create a valid contract of lease."

2. The trial court finds that the defendants repudiated the agreement "without good cause", by failing to negotiate further; and incongruously condones and relies upon their wilful breach of contract as a reason for denying specific performance. There is certainly nothing in law, equity or logic which supports such an irreconcilable conflict. (See Assignment No. V.)

3. The trial court further finds in effect that there was a definite and unequivocal meeting of the minds upon the material and essential provisions of the

lease, in the following language: "That since the execution of said agreement plaintiff has been ready and willing to receive from defendant Irene Gladys Mapes a lease of said hotel structure containing the terms *which were settled and agreed upon by said agreement of September 24, 1945*". (Tr. Vol. 2, p. 917, par. 9.)

May the query be propounded here that if the plaintiff was ready and willing to receive a lease containing these essential provisions agreed upon, is it equity to deny him a lease only and because the defendants broke their contract? In the name of equity and established precedents, did not this wilful and inexcusable breach give him an immediate right of action? (See Assignment No. IV.)

4. The trial court's decree ignores an elemental principle of contract law, namely, that "Where a person by his contract charges himself with an obligation possible to be performed, he must perform it".

13 C. J. 635, Section 706, cited in Assignment No. 2 (supra).

The trial court concludes that the defendant Irene Gladys Mapes is immune from this fundamental principle; that though she obligated herself to negotiate for the subsidiary terms, she had a perfect legal right to repudiate "without good cause", escape further negotiation, and violate her solemn written promise. A careful search has revealed no authorities in support of this obviously unwholesome doctrine. (See Assignment No. IX.)

5. The trial court ignores the fact that the contract is complete and definite in itself. It contains no condi-

tion that it shall become definite or complete only upon the happening of some future contingency. It is a contract *in praesenti*, for which the plaintiff was obligated to deposit, and did deposit, ten thousand (\$10,000.00) dollars in cash as an evidence of good faith. (Assignment No. X.) The further fact that the contract provided for the formal and later execution of a lease, *did not negative the existence of the contract, the terms of which had been assented to and agreed upon.* (See Assignments Nos. XI and XII and citations, *supra*.)

6. The trial court, in excusing and exempting the defendant Irene Gladys Mapes from further negotiation, ignored a well known maxim of equity, namely, "Equity regards as done that which ought to be done." (See Assignment No. XII.) This maxim is strikingly applicable here. The defendant suddenly closed the doors against negotiation. Her unwarranted defeat of plaintiff's right left him no alternative but to rely upon a decree of a court of equity to apply this established maxim. Since the defendant ought to have proceeded to further negotiation and deliberately refused, the trial court should have regarded negotiations "as done", and granted relief upon the material and essential provisions of the contract as confessedly agreed upon.

7. The trial court ignored the well established doctrine of equitable estoppel. The defendants should have been estopped from setting up their own wilful breach of the contract as a defense. This serious contention, based upon sound equitable principles, has

been submitted *supra* with numerous citations of authority.

8. The trial court ignored another well established doctrine of equity, namely that the solemn promise of the defendants to negotiate further, was a condition precedent which they are prohibited, in equity, from setting up as a defense in the face of their conceded wilful repudiation. This point has been likewise presented *supra*, with citations of authority.

9. The trial court concludes as an additional reason for denying specific performance that if such were decreed, "the court would be compelling antagonistic parties to form a partnership or a relation in the nature of a partnership in the control and management of a large hotel." (Tr. Vol. 2, pp. 922-923.) This conclusion, in effect, declares the erroneous principle, first: that a valid contract entered into by one party with two other parties, who undertake a joint lease may be annulled and cancelled at will by first party, if the joint lessees become antagonistic in advance of active operations or, in fact, dissolve their joint relationship; and second, that though there be a valid, legal contract, if the first party breached without good cause, and there was no remedy at law, neither one of the second parties would have a remedy by way of specific performance. It is respectfully submitted that such is not established law or equity.

"There is a fiduciary relation existing between joint tenants, joint vendees, and joint optionees, which gives to one the right to perform acts beneficial to the common estate. Certainly Shaeffer

and Herman by thus acting could not defeat the right of Shaeffer to insist upon a performance of the contract when he had complied with its terms. We therefore conclude, under the facts as found, that Shaeffer is in position to compel specific performance of the contract."

Shaeffer v. Herman, 85 Atl. 94, citation from page 96.

"It was asserted by the defendant upon the trial below that his contract with Horst brothers was annulled by the dissolution of that firm and the assignment by one partner to his co-partners of his interest therein. To this proposition we cannot assent. A contract was entered into by Roehm with the plaintiffs jointly, not with either of them separately. The dissolution of the firm in no way affected the obligations of any of the parties. The retiring member, Paul R. G. Horst was, notwithstanding his withdrawal, answerable to Roehm for the faithful performance of the contract; and in like maner Roehm was still bound to the remaining members of the firm. The same principle which would have permitted Roehm to compel the performance of the contract on the part of the plaintiffs, either in their partnership or individual capacities, enables them, in the same way and to the same extent, to require him to observe the obligations entered into on his part."

91 Fed. 345, 33 C.C.A. (3rd) 550, Affirmed 20th Supreme Court 780, 178 U.S. 1, 44 L. Ed. 953, citation from 91 Fed. at 346.

"There is no evidence that the parties continued to do business under the name of Von Breton-

Rothwell Optical Company, or that a partnership of that name was ever formed; and, if they did so, it would be wholly immaterial to the issues of the case. The respondent had covenanted with the two Rothwells that he would not engage in a same business in Los Angeles for his own benefit, or for the benefit of any person or firm other than the Rothwell Optical Company. As this firm was dissolved, then respondent was not entitled to engage in the business in Los Angeles for anyone. * * * In any event, Chester Rothwell, as one of the parties beneficially interested in the covenant, was entitled to enforce its obligation."

Rothwell v. Vaughn, 193 Pac. 611 at 613 (1920).

"The complaint did not allege a transfer of the contract to the plaintiff or an assent of the defendants to an assumption of it by him individually; nor did it allege notice to the defendants that he was undertaking to perform it in an individual capacity. It only alleged that the plaintiffs partners had notified the defendants that they had withdrawn from the partnership, and that the plaintiff continued to get out logs under the original contract. This was an inferential allegation and he was acting in performance of the still subsisting obligation of the partnership. It is a general rule of law, wanting provisions in the contract to the contrary, that a partnership and all of its members continue bound by its contracts not performed even after dissolution, and that one partner has power to proceed with the performance of such a contract for the firm. * * * A dissolution does not ordinarily absolve the

other party to the contract from his contractual obligation to the firm; there being no actual abandonment by all of the members of the firm. 30 Cyc. 661. It follows that the partners were necessary parties to the action for an alleged breach of contract, which was, so far as the complaint showed, still a subsisting contract of the partnership in its relation to the defendants, whatever the agreement of the partners among themselves.”

Dew v. Pearson, 132 P. 412 at 413 (1913, Washington).

In further emphasis upon this point, it should be noted here that the defendant Charles W. Mapes, Jr., appellant's co-lessee, became, on November 6, 1947, *a few weeks after the contract was executed, an actual one-third owner in the property by virtue of a conveyance made to a partnership, of which all the personal defendants share an equal one-third interest.* (Tr. Vol. 2, p. 474. See also p. 499.) It follows, therefore, that there was a dual fiduciary relationship between the defendant Charles W. Mapes, Jr. and this appellant, which obligated him, in two capacities, to respect the contractual rights of appellant. It is also clear from the evidence, that *all* the defendants cooperated to defeat appellant out of his just rights.

10. The trial court has erroneously concluded that the solemn written contract in evidence here was a mere scrap of paper to be torn up and thrown in the wastebasket at the will and caprice of any party thereto, and that this was the intention of the parties when they entered into it.

THE COURT HAS AMPLE JURISDICTIONAL AUTHORITY TO DECREE SPECIFIC PERFORMANCE HEREIN AND ACCORD EQUITY AND JUSTICE TO THE WRONGED APPELLANT.

The Supreme Court of Nevada has announced the general rule in this State applicable to the remedy of specific performance, which has never been modified or reversed, and is still in full force and effect. The rule is as follows:

“Courts of equity ought to determine the rights of parties according to the broad principles of justice and fair dealing and not by the technical and refined distinctions of the law.”

Schroder v. Geminder, 10 Nev. 355.

And in another Nevada case, in which it was contended “that the memorandum was merely preliminary and that it was contemplated by the parties that something yet was to be done, that further conferences were to be had” (which is one of the contentions here) the Supreme Court of Nevada held that the parties, having reached an agreement upon the *essential terms*, specific performance should be decreed.

Dondero v. Turrillas, 59 Nev. 374, 94 Pac. (2d)

276, citation from page 394 Nevada Report.

“There has been a progressive tendency in the United States to increase the number of cases in which money damages are not regarded as an adequate remedy, with a resulting greater liberality in granting decrees for specific performance.”

Restatement of the Law—Contracts, Vol. 2,
Sec. 358, p. 635.

“The decree need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract; it may be so drawn as best to effectuate the purposes for which the contract was made, and it may be granted on such terms and conditions as justice requires.”

Ibid. Sec. 359, p. 638, par. 2.

“The function of the court is to do complete justice; and it has power to mold its decree to that end.”

Ibid. Sec. 359, p. 639 par. (b).

“Specific performance is available to enforce a contract the purpose of which is the transfer of any recognized interest in land to the purchaser, even though it is less than a fee simple.”

Ibid. Sec. 360, p. 643, par. (c).

See also quoted last paragraph in *The Hydraulic Power Co. v. Pettibone Cataract Paper Co.* (supra).

It is therefore respectfully submitted that the prayer of plaintiff-appellant's amended complaint (Tr. Vol. 1, pp. 14-35), is sustained and justified, not only by the evidence, but by salutary principles of equity as hereinabove set forth. That the order and decree of the trial court in favor of the defendants should be reversed, and that specific performance of the contract should be ordered decreed in favor of the plaintiff-appellant herein.

Dated, Reno, Nevada,

November 5, 1947.

SAMUEL PLATT,

Attorney for Appellant.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

**MOTION OF APPELLANT HEREIN
FOR REIMBURSEMENT BY APPELLEES FOR CAUSING
UNNECESSARY COSTS ON APPEAL.**

*To the Honorable the United States Circuit Court of
Appeals for the Ninth Circuit:*

Now comes the appellant above named, through his undersigned attorney, and moves the above entitled Court for an order requiring the appellees to reimburse appellant for unnecessary costs expended by him in the preparation and filing of the record on appeal herein, in the amount and upon the grounds and reasons following:

1. That appellant's "Designation of Contents of Record on Appeal" (Tr. Vol. II, page 940) includes "Transcript of Testimony reported by the Court Reporter." That appellees' "Designation of Additional Portions of Record, Proceedings and Evidence to be Included in Record on Appeal" includes "Notice of Motion by Defendants to Dismiss, and Subject Thereto, to Strike Portions of Plaintiff's Amended Complaint", and likewise includes not only the transcript of testimony reported by the court reporter, but all objections, and arguments and rulings thereon as reported in shorthand by the official court reporter.

(a) Such additional designation by appellees creates an unnecessary cost and expense for the reason that the notice of motion to dismiss and strike was overruled by the trial court, and no cross-appeal has been taken herein by appellees. Further, said motions and ruling thereon are not involved in this appeal.

(b) That the complete transcript of testimony reported by the court reporter, which appellant designated as a part of the contents of the record on appeal, contains all the rulings of the trial court, which with few exceptions were all in favor of the appellant herein. The appellees have taken no cross-appeal challenging these rulings. None of these rulings is involved in this appeal. Appellees' designation that the arguments of respective counsel be likewise included in the record has unnecessarily encumbered the record with additional unnecessary costs and expenses. That the court reporter, in order to include these arguments throughout the record, informed

appellant's counsel that such arguments could not be included unless the entire record were retranscribed. This accordingly was ordered and done. The cost of retranscribing the entire record, for which appellant paid, was in the sum of \$422.00. That in addition to re-typing this additional record, it was necessary that it be printed, with an increase of 272 in the number of printed pages. The number of extra pages was computed on the following basis:

The printed record comprising transcript of testimony consumed 791 pages, from page 116 to 907 inclusive. It was composed from 841 typewritten pages of the reporter's transcript. The reporter's transcript, as designated by the appellant, comprised only 552 typewritten pages, which would have composed into 519 pages of the printed record. In other words, appellant's selection of the transcript would have made up 519 pages of printed record as against 791 pages of printed record as designated by the respondents, the difference of 272 pages.

Cost of Completed record of 942 pages	\$2140.00
Average cost per page	2.27
272 pages at \$2.27 per page	\$617.44.

In addition there is the added cost of the retranscription of the entire record in incorporating respondents' arguments on objections, which created an increased cost of \$422.00. \$422.00 plus \$617.47=\$1039.44, which is the increased cost of the record caused by the respondents' demand for incorporating in such record his arguments on the objections and rulings.

Wherefore, appellant prays that an order enter herein ordering and directing the said appellees to reimburse the said appellant in the sum of \$1039.44.

Dated, Reno, Nevada,

November 5, 1947.

SAMUEL PLATT,

Attorney for Appellant.

No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF FOR APPELLEES.

H. R. COOKE,

JOHN D. FURRH, JR.,

First National Bank Building, Reno, Nevada,

Attorneys for Appellees.

FILED

DEC 19 1947

PAUL P. O'BRIEN, CLERK

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IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF FOR APPELLEES.

**INCOMPLETENESS RE QUOTATIONS IN
APPELLANT'S OPENING BRIEF.**

At page 7 (near bottom) appellant misquotes the court's finding which was and is:

“That on or about the 24th day of September, 1945 the above named plaintiff and the above named defendants entered into the written agreement above set forth, Exhibit ‘C’.”

Nowhere did the trial court find (as stated) there was any written agreement “for the leasing of the

hotel premises''. Per contra, what the trial court said, referring to said "Exhibit C", is

"* * * but it is not complete * * * there is here a definite provision that further negotiations were to be had and that no lease was to be executed except as a result of the required further negotiations as to terms, conditions and details of contemplated lease or other than those established by the agreement." (R. p. 921.)

The purported partial quotation from Finding No. 9 (R. p. 917) in the form as stated (Op. Br. p. 18(b)), is not clear without including the remainder, viz.:

"* * * of September 24, 1945, but that it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations as to terms, conditions and details provided for in the agreement."

We say the said omitted portion is very important and that it amounts to a finding by the trial court that the matters left by Exhibit C for "further negotiations" were of a vital, substantial and important character, else how construe the language supra

"* * * it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations * * * "? (R. p. 917.)

The trial court used no italics such as are found under quotes (Op. Br. p. 8(b), (g) and elsewhere, and the words "to be leased" (Op. Br. p. 18) under quotes, are not found in the opinion of the trial court.

REVIEW OF APPELLANT'S OPENING BRIEF.

Appellant's "Statement of the Case" page 3, states the parties entered into a written agreement "For a lease of a hotel". We deny it and say it was a mere preliminary agreement by the parties, so declared by them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provision in the contract.

Appellant refers (Op. Br. p. 3), and this is many times repeated, to defendants' alleged "repudiation" of the agreement. Our reply is that the document never became a valid contract and that therefore there could be no "repudiation". The term repudiation is

"* * * everywhere odious, and which is never applied to the refusal to perform a valid contract, but to the denial of the binding force of a valid obligation."

Wapello County v. Burlington etc. R. Co., 44 Iowa 585, 610 (dis. op.).

See, also:

54 C. J. 686.

Appellant argues (Op. Br. pp. 22, 23 et seq.) that the Exhibit C document is "complete" etc. But if so, how explain clause 3 (R. p. 910) to the effect that the parties shall later meet and discuss terms, conditions and details and if they can then mutually agree, a lease shall be signed? How explain the clause in Paragraph 10 of Exhibit C (R. p. 913):

"* * * this preliminary agreement"?

"Preliminary" is defined as "temporary"; "provisional" (49 C.J. 1325); that which precludes the main work. (Webster.)

The word "also" denotes "besides"; "in addition to". (*McCurdy v. The Alpha etc. Co.*, 3 Nev. 27, 37; *Dalton v. Bowker*, 8 Nev. 190, 210—Webster.) As "denoting new, distinct and additional matter". (3 C.J.S. 896; *West Heights etc. Corp. v. Adelman* (N.J.) 152 A. 196.)

Bondy v. Harvey (C.C.A. 2nd), 62 F. (2d) 521, is cited (Op. Br. p. 25). This was a fraud action at law and did not involve specific performance. Because the court found that in the contract involved "nothing was left open to be agreed upon by the parties", the mutual satisfaction clause mentioned by appellant was (Id. p. 523) without effect. In the instant case we have the garage clause (R. pp. 911-912) that terms therefor are "to be mutually agreed upon". We have the clause (R. p. 910) that lease shall be made "provided that the terms, conditions and details * * * can be mutually agreed upon * * *."

Adamson v. Alexander etc. Co. (C.C.A. 2nd), 275 F. 148 (Op. Br. p. 27). Action at law for breach of contract. The trial court held agreement was a mere option, but for this error the judgment of dismissal was reversed.

Appellant's complaint (Op. Br. p. 28) that defendants refused to confer or negotiate is unfounded in the light of the finding (R. p. 918) that plaintiff never requested any "further discussion", and also in view of the fact that plaintiff had some four months from December, 1946 to April 10, 1947 within which to request such "discussion".

Wright v. Farmer's etc. (C.C.A. 7th), 74 F. (2d) 425 (Op. Br. p. 32) is cited to point that defendants here should be held estopped to set up "their own wilful breach" as a defense. We answer that under Finding 13 (R. p. 918) the "breach" was "the fault of both parties", and that after lapse of some four months (more than a reasonable time, we say), defendants notified plaintiff they declined to proceed further. Further, the *Wright* case was at law and did not involve specific performance. Defense was the statute of frauds, and plaintiff claimed certain conduct relied upon by it estopped defendant to rely on such defense.

To constitute equitable estoppel there must concur an act or statement inconsistent with the claim afterwards asserted, action thereon by the other party and injury to such other party. "There can be no estoppel if either of these elements are wanting" (21 C.J. 1119, Sec. 122). There was no "reliance" by plaintiff, and no injury to plaintiff. (Finding 7, R. p. 916.) Plaintiff was not misled to his injury. (21 C.J. 1135.) Mere silence of itself will not raise an estoppel. (21 C.J. 1150, Sec. 154.)

Halsey et al. v. Robinson (Cal.), 122 P. (2d) 11 (Op. Br. 33). Tenants had improved the realty in consideration of landlord offering of lease renewal; also had executed a quitclaim deed by reason of certain false representations of one of the plaintiffs landlords.

Nichols v. Hurtig etc., 217 N.Y.S. 191 (Op. Br. p. 35. Recognized that one in the situation of plaintiff

here, after having a reasonable time to demand further discussion, etc., has no ground for complaint that other party refused to further proceed.

Pokegama etc. Co. v. Klamath River etc. Co. (C.C. N.D. Cal.), 96 F. 34 (Op. Br. p. 36). This was not a decision by this court as appellant states. Plaintiff had expended upward of \$70,000 in a sawmill in reliance upon defendant's acquiescence etc. Defendant took forcible possession of mill, claiming a forfeiture of lease, but the court held defendant was estopped.

Swain v. Seamens, 9 Wall. 254, 19 L. ed. 555 (Op. Br. p. 36). Accepting as we do the principle of law there declared, where is there any showing here that plaintiff "would be pecuniarily prejudiced"? His feeble effort (R. p. 8) was found untrue by the trial court. (R. p. 916, Fdg. 7.)

Letta v. Cincinnati etc. Co. (C.C.A. 6th), 285 F. 707 (Op. Br. p. 37). Another case recognizing the acts relied upon must mislead party asserting estoppel to his prejudice. Plaintiff's attempted claims of prejudice in case at bar were found to be untrue by the trial court. (R. p. 916, Fdgs. 5, 7.)

First Federal Tr. Co. v. First Nat'l Bank (C.C.A. 9th), 297 F. 353. A complicated case, but in tacit recognition of principle that the conduct relied upon must have induced party asserting to alter his position to his prejudice.

The citations in Op. Br. page 37 all appear to be to same effect. In view of the Finding No. 7 (R. p. 916) that plaintiff suffered no pecuniary loss and in

view of the further Finding No. 10 (R. p. 917) that defendants made no representation by word, conduct or otherwise that a lease would be tendered without further discussion as to terms not fixed by Exhibit C, we fail to see any application of such authorities.

Plaintiff complains (Op. Br. p. 38) that defendants promised to negotiate. We answer: 1st. Before a party may be heard on such point he must show he has a valid contract; 2nd. That the court found (Fdg. No. 13, R. p. 918) that no request to negotiate was ever made from September 24, 1945 to April 10, 1946; 3rd. that plaintiff had a reasonable time and more, i.e., from December, 1945 to April, 1946 to request negotiating. The original time therefor was (R. p. 910) within ten days after construction of hotel commenced, and this commenced about Dec. 10, 1945; 4th. Under the circumstances, defendants had an undoubted right on April 10, 1946 to treat said Exhibit C as of no effect.

Plaintiff seeks (Op. Br. pp. 39-45) to invoke the rule that a promisor shall place no obstacle in way of happening of a condition precedent; that where he prevents fulfillment of a condition precedent he cannot rely on such condition. Granted, but such rule has no application here where the alleged contract is incomplete; also, plaintiff who thought (R. p. 910) ten days after construction of hotel commenced was ample time to discuss terms of lease, was actually allowed twelve times said period. But even then he never requested any discussion. See on point: *O'Donnell v. Lebb* (Ore.), 178 P. 212, 213.

35 C.J. 1202, Sec. 521 (Op. Br. p. 46). The garage was a part of the premises, but Exhibit C fails to state the amount of rent if the garage is to be included in lease. Lessees were to have privilege of garage service for the hotel guests "on terms to be mutually agreed upon".

58 C.J. 941 is cited and quoted from (Op. Br. p. 46). The portion of the section next following that quoted by appellant reads:

"On the other hand, it may be proper and necessary to refuse specific performance of such an agreement, as where it is incomplete and leaves terms for further negotiations and settlement."

Bennett v. Moon (Nebr.), 194 N.W. 802; 31 A.L.R. 495 (Op. Br. p. 47). The contract in that case which was very full, left no further details, as here, to be later discussed, merely provided:

"It is agreed that a lease shall be executed covering this agreement between the parties hereto as to said building".

Plaintiff's Op. Br. p. 47 calls special attention to the A.L.R. note. In the note we find the following:

"The term 'usual clauses' is without meaning because there are no set or standard clauses adopted by all persons who draw leases".

Buchman v. Faltis (Mich.), 150 N.W. 848, is also cited (Op. Br. p. 48) to same general point. There, it was objected the agreement for a lease was not conditioned against lessee forming a corporation with a minimum capital to take over lease and thus avoid personal responsibility.

Cochrane v. Justice Mng. Co. (Colo.), 26 P. 780, cited (Op. Br. p. 48). This involved a mining lease. Objection was made that the agreement, which was otherwise complete, contained a clause "settlement as usual", and it was contended this made the agreement too uncertain for specific performance. The court found that there had been a prior lease on the same property, to which the clause might properly refer, and also such clause might refer to a custom. The agreement involved had no clause regarding lease containing other or further provisions, provided the parties could mutually agree, etc. There were two dissents and one dissenting opinion.

Levin v. Saroff (Cal.), 201 P. 961, is cited and quoted from (Op. Br. p. 50). The agreement there was as long or longer than the ordinary lease and contemplated a lease for only 5 years at a monthly rental of \$250.00. A point differentiating that case from the instant case is that there the agreement had been acted upon by lessee taking possession. The same court in a later case distinguished on this very point. (*Cappelmann v. Young* (Cal.), 165 P. (2d) 950-953; also *Store Properties v. Neal* (Cal.), 164 P. (2d) 38, 41). The contract was objected to as being too uncertain because it did not name city and state where property was located. The taking possession by lessee was held to cure any uncertainty as to location. Nor did that case involve any condition about the parties later signing a lease provided the terms could be mutually agreed upon.

Temple Enterprises v. Combs (Ore.), 100 P. (2d) 613; 128 A.L.R. 856, is cited (Op. Br. p. 51). The action involved 3 separate agreements, signed, etc. for lease of a theatre property. Taken together, and as recited in the Opinion, they contained all essentials of the lease, the court adding that other provisions contained were of the standard type and ordinarily found in leases of this character and need not be mentioned. There was no clause providing (as in the case at bar) for a subsequent lease or agreement providing the parties were able to agree on the terms. The only claim was that by oral agreement certain terms were left open for future arrangement, but the court held such matter was unavailable under the Oregon statute of frauds.

United States v. City of New York (C.C.A. 8th), 131 F. (2d) 909, is cited (Op. Br. p. 51). This involved an agreement for sale of an old post office building and federal court house, which agreement involved about \$3,000,000.00 and was evidenced by correspondence between the Mayor and the Secretary of the Treasury (set out in the Opinion of the District Judge, 45 F. Supp. 229), and which was held to constitute a "contract". The question of who should bear cost of demolition was not agreed upon, but the court passed it over as a "minor detail". It does not appear what the item amounted to, but from other objections seemingly utterly trivial in a \$3,000,000.00 contract the amount must have been deemed so insignificant as to be *de minimis*, etc. In any event the contract purported on its face to be complete and

final, not a "preliminary agreement", nor providing for a future agreement to be made providing the parties could agree upon the terms.

At pages 52 and 53 Op. Br., it is sought to invoke the principle that contracts for lease will be enforced almost as a matter of course. We say such principle presupposes a final, valid and binding contract for a lease.

At pages 54 and 55 of Op. Br., it is argued that damages would not be recoverable in the instant case because too speculative, etc. We answer this the same as next above.

Plaintiff takes issue (Op. Br. p. 59) with the trial court's Finding (R. p. 59) that by decreeing specific performance

"the court would be compelling antagonistic parties (plaintiff and Charles W. Mapes, Jr.) to perform a partnership or a relation in the nature of a partnership in the control and management of a large hotel".

The evidence shows a rather intense degree of hostility as between plaintiff and his potential partner. The case as to this point is clearly within the rule of *Hyer v. Richmond Lumber Co.*, 168 U.S. 471; 42 L. ed. 547 (cited by the trial court). The case of *Rochm v. Horst et al.* (C.C.A. 3rd), 91 F. 345; affd. 44 L. ed. 953, did not involve "antagonistic parties".

Rothwell v. Vaughn (Cal.), 193 P. 611, and *Dew v. Pearson* (Wash.), 132 P. 412 (Op. Br. p. 61) appear to involve only rights of a surviving partner

after dissolution of firm and nothing as to specific performance where decree would in effect compel "antagonistic parties" to form a relation for management of a business.

Dondero v. Turrillas, 59 Nev. 394, 94 P. (2d) 276 (Op. Br. p. 63), as pertinently observed by the trial court (R. p. 63) did not involve a contract in which, as here, there was a definite provision that further negotiations were to be had. The attitude of the Nevada Supreme Court is expressed:

"There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain or indefinite". (*Dodge Bros. v. Williams Estate Co.*, 52 Nev. 364, 287 P. 282, 283-284.)

THE SEPTEMBER 24, 1945 DOCUMENT NEVER BECAME A CONTRACT ENFORCEABLE EITHER IN EQUITY OR AT LAW, IN THAT IT AFFIRMATIVELY APPEARS THE MINDS OF THE PARTIES NEVER MET UPON TERMS, CONDITIONS OR DETAILS OF FINAL LEASE.

For convenience we excerpt portions of the Exhibit C document which we believe brings said Ex. C within the rule stated in the caption.

"* * * plans and specifications must be approved in writing by the parties hereto before any lease on said premises shall become effective (R. p. 909) * * * Whereas it is contemplated the first party shall grant a lease (for 20 years) to the second parties. * * * The parties hereto (R. p. 910) shall immediately enter into a discussion with each other as to the terms, conditions and

details of said lease. * * * The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease * * * provided that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after * * * actual construction has been commenced. * * * The said lease shall provide (R. p. 911) among other things (that lessees shall furnish equipment, etc.) * * * If the lease is to include the garage, then the second parties shall pay monthly 10% of the gross garage receipts, or if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon. * * * The second parties (R. p. 912) as a part of said lease, will guarantee to said first party that the total annual income from the entire building which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within the lease period.

The said lease (R. p. 913) shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected."

The case *infra*, decided January 7, 1947, is the most recent case we can find on the subject and we

believe it to be squarely in point with the case at bar. It involved an alleged contract very similar to Ex. C in instant case, which contained a clause:

“It is understood that this is a temporary agreement further details to be included in a more particular agreement to be later drawn up and signed.”

There, as here, the trial court found the document did not constitute a “completed contract”; that it was merely

“an expression of a desire and a preliminary agreement to enter into a later contract”.

On appeal in affirming, the court said (p. 995):

“It is obvious from the very terms of the paper upon which the appellants rely that the purported contract was incomplete for it says * * * ‘a more particular agreement to be later drawn up between the parties’ ”.

Reed v. Montgomery (Ore.), 175 P. (2d) 986, 994-995-996-997, reviewing authorities.

An agreement that parties will in the future make such contract as they may then agree upon amounts to nothing, and cannot be made the basis of a cause of action, even for damages.

Dillingham v. Dahlgren (Cal.), 198 P. 832, 834.

See also:

Union Oil Co. v. Union Sugar Co. (Cal.), 173 P. (2d) 700, 708.

In the case *infra* which involved an agreement to lease, action was for damages for alleged breach of executory agreement to enter into the lease. In construing and analyzing the preliminary agreement before it, the court said, *inter alia*:

“It may be conceded that an agreement to enter into a lease will neither be enforced in equity nor at law *if it appears from the face of the agreement that any of the terms of the lease, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the lessor and lessee.* In such cases there is no complete agreement; the minds of the parties have not fully met; and, until they have, no court will undertake to give effect to those stipulations that have been settled, or to make an agreement for the parties respecting those matters that have been left unsettled.” (Citing cases.) (Emphasis supplied.)

Scholtz v. Northwestern etc. Ins. Co. (C.C.A. 8th), 100 F. 573, 574.

Cited and approved per *supra* in:

Thomas J. Baird Inv. Co. v. Harris (C.C.A. 8th), 209 F. 291.

See also: per Hawley, Jr.:

Snow v. Nelson (C. C. Nev.), 113 F. 353, 354.

The writing signed by both parties in the case *infra*, provided for the construction of a building and apparently covered at least the essentials, but there was a concluding clause reading as follows: “Formal contract to follow”.

One of the parties later refused to proceed and action was commenced by the other. The trial court decided that a cause of action existed, but on appeal this was reversed, the Supreme Court, *inter alia*, saying:

“No formal contract was ever forwarded for execution by Dunnivant and none in fact was entered into, and thereafter the appellant prosecuted the work described in the writing through other parties. * * * The cause was tried in the court below by the judge sitting without a jury, and resulted in a judgment in favor of the respondent for the full amount claimed namely \$1700.00. * * * The principal question suggested by the record is whether the writing contained the bid of Dunnivant and the acceptance thereof by the appellant constituted the completed contract between the parties, *or was it an agreement settling some of the terms of the contract to be entered into later.* The face of the writing, it is at once apparent, indicates that it was intended as the latter, rather than the former. After specifying certain particulars, it expressly provides that the *formal contract is to follow.* If the writing itself was intended as the completed contract, there would have been no need for the proviso. A contract complete in itself does not need the sanction of another contract. * * * The writing, in whatever aspect it is viewed, therefore, seems to us to point to the conclusion that it was not intended to be the final agreement between the parties. * * * Both parties were men of ability and experience, and it would hardly seem that if they intended this writing to be a complete contract between them they would solemnly provide, both in writing

and orally, for a further agreement.” (Emphasis supplied.)

Stanton v. Dennis (Wash.), 116 P. 650, 651.

See also:

Grow v. Davis (Kan.), 203 P. 683, 684;

St. Louis etc. Co. v. Gorman (Kan.), 100 P. 647, 649;

Mercantile Tr. Co. v. Sunset Road Oil Co. (Cal.), 168 P. 1033, 1041;

13 C. J., 289, Sec. 100 & N. 12 citing long list of cases including: *Morrill v. Tehama etc. Co.*, 10 Nev. 125;

Holtz v. Olds (Ore), 164 P. 583, 587, rehearing denied: Id. P. 1184;

Toms v. Hellman (Cal.), 1 P. (2d) 31, 33-35.

Action for damages on a shipping contract which was in some respects incomplete and looked to a future contract. In discussing the subject the court, quoting said:

“A contract between two persons, upon a valid consideration, that they will at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof, the party having the election or option may recover in damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will in the future make such contract *as they may then agree upon amounts to nothing*. An agreement *to enter into negotiations, and agree upon the terms of a contract, if they can*, cannot be made the basis of a cause of action. There will

be no way by which the court could examine what sort of a contract the negotiations would result in, no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.

* * * Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties, but *where the preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.*” (Citing: *Shepard v. Carpenter* (Minn.), 55 N. W. 905.) (Emphasis supplied.)

St. Louis etc. Co. v. Gorman (Kan.), 100 P. 647, 649, 28 L.R.A., N. S. 637.

See also:

Beall v. Foster (Ore.), 186 P. 554, 555.

Memorandum of agreement to lease stores, describing same, for five years beginning January 1, 1911, \$250.00 for the first two years and \$275.00 for the following years. Usual clauses in lease to rebuilding,—was held not to satisfy the statute of frauds, C. C., Section 1624, though assuming that the figures \$250.00 and \$275.00 meant monthly, because the phrase “usual clauses in lease to rebuilding” were so uncertain in the absence of proof of any usual or customary clauses in the lease with respect to rebuilding; that

an action would not lie to enforce performance of the contract, nor for damages for its breach.

Wineburgh v. Gay (Cal.), 150 P. 1003, 1004.

See also:

Palmer v. Porkany (Mich.), 186 N. W. 505,
31 A.L.R. 506—Note;

Kerr etc. Corp. v. Eliz. Arden etc. (Cal.), 141
P. (2d) 938, 939;

Van Hoosen v. Briscoe (Cal.), 259 P. 1115,
1116;

Duffield & Co. v. Ellsworth, 255 N.Y.S. 716;

Evans v. Marr, (C.C.A. 5th), 298 F. 288, 290;

Hackley v. Oakford (C.C.A. 3rd), 98 F. 781,
cert. denied, 44 L. ed. 945;

Linnard v. Sonnenschein (Cal.), 272 P. 315,
318—citing, *Morrill v. Tehama etc. Co.*, 10
Nev. 125;

Elliot on Contracts, Vol. 1, Sec. 175;

Long v. Needham (Mont), 96 P. 731;

Monahan v. Allen (Mont.), 130 P. 768, 771;

Kofoed v. Bray (Mont.), 220 P. 532;

122 A.L.R. 1256—Note;

Shepard v. Carpenter (Minn.), 55 N. W. 906;

Segner v. Guaranty etc. Co. (Iowa), 189 N. W.
745;

An agreement to purchase land “subject to a proper contract” to be prepared by the vendor’s solicitors was conditional upon the execution of the proper contract, and that no binding agreement resulted, notwithstanding the vendor’s solicitors prepared proper contract, which was signed by the vendor, but was

not signed by the purchaser, although his solicitors approved it. See:

122 *A.L.R.* 1271 and N. 94.

See also:

122 *A.L.R.* 1272 and N. 99.

Memorandum for lease reciting that defendants agreed to lease an hotel to a third person, but that it contained only principal points of their understanding, and that lease should contain the "usual covenants", does not create either in law or equity any enforceable right for or against either party.

Woods v. Mathews (Mass.), 113 N. E. 201, 31 *A.L.R.* 507—Note.

If the parties understand at the time of the preliminary agreement that a written contract shall be entered into embodying the terms proposed and such other terms as may be deemed necessary, the execution of the written agreement is essential to a valid contract. Th case involved a preliminary contract embracing certain stated terms with the clause "and such further conditions as may be deemed necessary". And it was held that an enforceable contract was not shown.

Eads v. Carondelet, 42 Mo. 113.

See also:

Mortenson v. Cruikshank (Wash.), 101 P. (2d) 604, 605;

Esselstyn v. Meyer etc. Bank (Mont.), 208 P. 910, 913;

Western Roofing etc. Co. v. Jones (Okla.), 109 P. 225, 226.

In the case *infra*, the preliminary agreement for sale of real estate contained a clause

“A formal agreement shall be entered into, pending actual transfer”

and it was held that if the formal agreement was to contain anything more than mere detail, the preliminary agreement could not be specifically enforced.

Northwestern etc. Co. v. Grays Harbor etc. Co. (C.C.A. 9th), 221 F. 807, 813.

To the effect such contract was void, see:

K V I v. Doernbecker (Wash.), 167 P. (2d) 1002, 1014;

Scholtz v. Northwestern etc. Co. (C.C.A. 8th), 100 F. 573, 574;

Store Properties v. Neal (Cal.), 164 P. (2d) 38, 40;

122 *A.L.R.* 1262—Note;

St. Louis etc. R. Co. v. Gorman (Kan.), 100 P. 647, 649;

122 *A.L.R.* 1258—Note;

Elliot on Contracts, Vol. 1, Sec. 175;

30 *A.L.R.* 573;

Brothers v. Arave (Ida.), 174 P. (2d) 202, 205-206—recent and important case;

Arnot v. Alexander (Mo.), 100 A. D. 252, 31 *A.L.R.* 510;

Cohen v. New England etc. Co. (C.C.A. 7th), 140 F. (2d) 1, 2, cert. denied, 88 L. ed. 1576;

25 *R.C.L.* 218, Sec. 17, citing long list of authorities;

Nolan v. Grimm (Ida.), 173 P. (2d) 74—important case;

- St. Paul etc. Co. v. Fox* (Wash.), 173 P. (2d) 194, 196—important case;
Union Oil Co. v. Union Sugar Co. (Cal.), 173 P. (2d) 700, 708—important case;
Nuttall v. Holman (Utah), 173 P. (2d) 1015, 1019—important case;
LaCompagna etc. v. Spanish etc. Co., 146 U. S. 483, 36 L. ed. 1054;
Karloek v. Johnson (Wis.), 160 N. W. 1053, 1054;
Williston, Contr. (Rev. Ed.), Vol. 1, Sec. 37, p. 99;
Weed v. Lindsay and Morgan (Ga.), 20 L.R.A. 33, 39—important case;
Huston v. Harrington (Wash.), 107 P. 874;
Veepe v. Hanson (N. D.), 169 N. W. 31;
Ecton v. Lexington Ry. Co. (Ky.), 59 S. W. 864;
McDonnell v. Coeur D'Alene Lbr. Co. (Wash.), 106 P. 135, 137.

The so-called guaranteed minimum (Par. 9, R. p. 912), is too uncertain to be specifically enforced.

See:

Pray v. Clack (Mass.), 31 A.L.R. 511—Note.

THE SEPTEMBER 24, 1945 DOCUMENT EXPRESSLY PROVIDES THAT A FORMAL WRITTEN LEASE SHOULD BE LATER ENTERED INTO—"PROVIDED THAT THE TERMS, CONDITIONS AND DETAILS OF SAID LEASE CAN BE MUTUALLY AGREED UPON * * *"

We excerpt:

"The parties hereto shall immediately enter into a discussion with each other as to the terms, conditions and details of said lease. * * * The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease with each other for all of said structure when completed, * * * provided, that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after the written contract for the construction of said structure has been entered into by the first party (Mrs. Mapes) and within 10 days after the actual construction has been commenced."

Obviously, the parties contemplated "terms" and "conditions" to be set up in the lease not set up or foreshadowed by the September 24th document,—else why the proviso?

The parties further contemplated that the "discussion" would or might develop terms or conditions not embraced within scope of the September 24th document, because they provide that they shall enter into a written lease provided the terms, conditions and details of said lease can be mutually agreed upon.

If the parties cannot "mutually" agree, then the inevitable conclusion is that there would be no lease,

nor could any court compel a lease because the parties had by the clause *supra*, reserved the right to disagree, as well as agree. We submit the following authorities in support:

The case *infra*, is very closely in point. In that case there was an agreement of the plaintiff to rent a building upon the demised premises to be rented in part by the defendant, and the lease provided that the lessor should proceed to construct a building upon the property and thereafter prosecute erection of same until completed; "that said building shall be constructed generally in accordance with the preliminary leasing plans and outline specifications therefor which are attached hereto, approved in writing by both the lessor and the lessee, and by reference made a part herewith the same as if set forth herein, and the final plans and specifications hereinafter referred to. The final plans and specifications shall be prepared by the lessor within a reasonable period of time, and shall be approved in writing by both the lessor and the lessee before the commencement of construction of said building, and upon said final plans and specifications being approved by the parties hereto as aforesaid, they shall become a part of this lease by reference to same as if set forth in full herein, and neither party to this lease shall unreasonably withhold its approval thereof."

The complaint alleged that plaintiff prepared the final plans and specifications, but defendant unreasonably failed to approve same and the building was not erected, to the damage of plaintiff. Demurrer to the

complaint was sustained without leave to amend, and the plaintiff appealed. In affirming, the District Court of Appeal, in the course of its opinion, said:

“Defendant maintained that the lease is merely an agreement to make an agreement, and therefore, is not binding upon the defendant in any way, either in an action upon the agreement itself or for damages for its breach. This for the reason that the final plans and specifications for the erection of a building to be prepared by the lessor and approved by the lessee was not approved.”

The court then considered whether that part of the clause relative to erecting the building and where the parties agreed to prepare and approve final plans and specifications left a material condition to be left for future agreement and concluded that it was apparent that approval of the final plans and specifications was essential prerequisite to a binding contract between the parties. Upon its face additional terms were to be agreed upon before they were to be bound by it.

Kerr Glass etc. Corp. v. Elizabeth Arden Sales Corp. (Cal.), 141 P. (2d) 938, 939.

See also:

K V I v. Doernbecker (Wash.), 167 P. (2d) 1002.

In the case *infra*, a lengthy preliminary agreement contained all of the essentials of a lease and was entered into and agreed to by both parties, and it provided that a lease was to be entered into upon the terms stated in the preliminary agreement.

On refusal of the owner to conclude the agreement or to sign up a lease for 99 years as contemplated, suit for specific performance was brought, and the court held that under the rule that an agreement could not be specifically enforced if its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable; under the rule that equity will not specifically enforce that which is only the basis for an agreement; under the rule that if the things mentioned in the agreement are the subject of future ascertainment, the agreement is not final but indefinite and cannot be specifically enforced in equity, and where the contract appears to be a preliminary agreement embodying only the spirit of a contemplated supplementary contract, showing that the minds of the parties never met upon the details, the contract is not specifically enforceable, the plaintiff was not entitled to specific performance.

Store Properties v. Neal (Cal.), 164 P. (2d) 38.

In the case *supra*, there is an unusually clear analysis of the authorities. It was there held that where it was understood that the terms of the contract were to be reduced to writing and signed by the parties, the preliminary agreement could not be deemed to become a completed contract until assent of its terms was evidenced by a writing subscribed by all the parties.

See also:

Daytona etc. Co. v. Glen Flora Co. (Ill.), 178 N. E. 107.

The case *infra*, involved suit for specific performance of an earnest money receipt or agreement re-

sulting from operation of hotel property described in the receipt. The so-called earnest money receipt contained a provision for the making of a lease and a chattel mortgage later on and the defendant agreed that she would execute the same. \$500.00 was paid down by the plaintiff. The preliminary agreement contained nothing in regard to what should happen in case of total destruction of the premises, etc. and this was referred to by the court as one reason why specific performance of a lease including any such provision would not be allowed. The same with abatement of rent, if there was a partial destruction; the same as to lessor being obligated to repair or replace roof when notified of any necessity therefor. The same in regard to damage to the property resulting from failure to maintain the roof or exterior of the building by lessor. The court stressed the fact that the receipt by its language contemplated that additional papers, namely, a lease, etc., would have to be prepared and executed before the deal could be closed. The receipt provided that upon completion of "proper" bill of sale, the defendant agreed she would execute same, etc., and the court concluding that the word "proper" left the matter ambiguous, asked what would be a proper lease. The court said a proper lease could not mean a lease in accordance with the terms and conditions of the receipt for if that had been the intent of the parties they would have so stated, as was done in the case of *Omak Realty etc. Co. v. Dewey* (Wash.), 225 P. 236.

The court also referred to the fact that no time was fixed when the proposed lease should begin to

run, except that when a proper bill of sale, chattel mortgage and lease should have been prepared, respondent agreed to execute them and surrender possession.

Then the court concluded that it was not intended by the parties to restrict the conditions of the lease to those contained in the receipt; that to specifically enforce the earnest money receipt the court would first have to determine what terms and conditions should be included in a proper lease. That to do this would be writing a lease, the terms and conditions of which were not covered by the earnest money receipt and upon which the minds of the parties had never met. This a court of equity will not do, and said:

“An agreement to enter into a lease should not be enforced if any of the terms of the lease are left open to future settlement.” (Citing cases.)

Keys v. Klitten (Wash.), 151 P. (2d) 989, 992-993, 996-997.

To the same effect, see:

Patch v. Anderson (Cal.), 151 P. (2d), 644, 646.

The case *infra*, is in point. There, a memorandum of an agreement was made between the parties, containing practically all of the details for the main contract, but it also contained the following clause:

“And a formal agreement shall be entered into pending actual transfers”.

The court held that this indicated that the parties intended that there would be a regular or formal agreement drawn later on and that they did not in-

tend to be bound by the preliminary agreement which was in the form of a letter and accepted by the other party.

Northwestern Lbr. Co. v. Grays etc. Co.
(C.C.A. 9th), 221 F. 807.

The opinion is lengthy and a number of cases are cited.

See also:

Durst v. Jolly (Cal.), 160 P. 449, 451.

See also:

Stanton v. Dennis (Cal), 116 P. 650, 651;

1 *Restatement Law Contracts*, 33, Sec. 26;

Boysseau v. Fuller (Va.), 30 S.E. 457.

See also:

13 *C.J.*, 289, Sec. 100 & N. citing long list of cases, including: *Morrill v. Tehama etc. Co.*, 10 Nev. 125.

“If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease.”

Dan Cohen Realty Co. v. Natl. S. & T. Co.

(C.C.A. 6th), 125 F. (2d) 288, 289, citing:

Elliot on Contracts, Vol. 5, Sec. 4550;

Alexander v. Alexander (Ore.), 58 P. (2d) 1265, 1266-1267.

A contract specified the manner of payment and the rate of interest and the time when the interest was to be paid, but it provided in conclusion that a contract was to be drawn up and signed within the

next few days. The court held that inasmuch as the memorandum did not disclose what all of the terms of the formal agreement were to be, nor specify whether or not the formal agreement was to contain provisions for default of payment of interest and taxes, specific performance was denied.

Venino v. Naegele (N.J.), 131 A. 895, 'Aff. 134 A. 920.

See also:

Carson v. Redding (Colo.), 120 P. 147, 148;
58 C. J. 943, Sec. 116;

Pomeroy Spec. Per., 3rd ed., p. 380, Sec. 148,
p. 394, Sec. 154.

Specific performance of an agreement to execute a lease, in which some details were to be later agreed upon between the parties and put in the lease, was refused in the case *infra*.

McKnight v. Broadway etc. Co. (Ky.), 145 S.W. 377.

In the case *infra* the written contract of sale left the price to be subsequently fixed by agreement of the parties, and it was held that this was not sufficient within the statute of frauds, the court saying:

"The price was still a matter yet to be determined by agreement. No meeting of the minds of the parties had yet occurred on the question of price, but the question of price was wholly reserved for future agreement. It was not left to be determined by a third party, or by the market rates, or in any manner other than by future agreement of the parties. Until such an agree-

ment has been reached and reduced to writing, no sufficient written contract can be said to have been executed to take the case out of the statute of frauds."

Booth v. A. Levy & J. Zentner Co. (Cal.) 131 P., 1062, 1063.

"And there are numerous cases supporting the rule that where the terms of a contract, or the conditions under which it is to become effective, are not fully and definitely settled in the previous negotiations, and a written or more formal contract embodying the completed contract is contemplated, no valid and enforceable contract exists until the execution of the written or more formal instrument."

122 *A. L. R.*, 1252. Note citing exhaustive list of cases.

See also:

58 *C. J.*, 941, Sec. 107 and N. 18-20;

Beck v. Cagle (Cal.) 115 P. (2d) 613.

An action was brought for breach of alleged contract to convey an apartment hotel and the memorandum relied upon as a contract contained a clause that the plans and specifications were to be approved; that plaintiff did not approve; that according to the written instructions, both parties reserved the right to approve letters with reference to plans and specifications and neither of the parties ever did approve. On the trial, it was contended that the document did not contain all the terms and conditions it should have contained to conform to the original oral agreement;

that there was no writing signed by the parties approving any plans and specifications for improvements, but on the trial the court commented on the fact that no proof was offered that the proposed supplemental instructions of defendants with regard to the plans and specifications were ever approved by the plaintiff. The trial court sustained a demurrer. On appeal this judgment was affirmed, the appellate court stating, *inter alia*:

“It was not the duty of the trial judge to insert what had been omitted, but merely to ascertain and declare the legal effect of the contents of the writings filed by Ajax in the vain hope of completing the escrow. * * * Appellant readily understood * * * that they (instructions) must be approved by defendants by filing their written approval in the escrow”.

Ajax Holding Co. v. Heinsbergen (Cal.) 149 P. (2d), 189, 191-192.

See also:

Evans v. Marr (C.C.A. 5th) 298 F., 288, 290,

In the case *infra* the preliminary agreement specifically provided for a lease to be executed according to a certain form known as Form No. 88, but which as set out in the contract there were left a number of blanks and it was provided that there was to be a subsequent contract. The court found that the lease could not be written without further negotiations respecting its terms and hence the contract was not binding.

Grow v. Davis (Kans.) 203 P., 683, 684-685.

See also :

Livingston etc. Works v. City of Livingston
(Mont.) 162 P., 381;
1917D L. R. A., 1074, 1078, 1079.

The agreement in the instant case calls for the erection by the first party of a hotel building according to plans and specifications to be agreed upon in writing between the first party and the second parties. In the case *infra* it was held that an agreement to lease a building if certain alterations are made upon plans to be agreed upon, imposed no obligations upon the owner to execute the lease if no plans are agreed upon.

Mayer v. McCreery (N. Y.) 23 N. E., 1045;
L. R. A., 1917D. Note p. 1080.

The case *infra*, involving agreement to give a lease, which contained specific provisions as to what the lease when drawn should provide for and what the parties had agreed to, etc., and among other things was a clause that provided that the landlord should approve plans and specifications for alterations and because of this clause the agreement was held not capable of specific performance. The court said that the plans and specifications had not been prepared; that when they were prepared it was manifest they should be prepared by and to the satisfaction of the proposed lessor; that by the clear language of the written instrument involved, they were also to be approved by Mr. Burrow, the proposed lessee. The court said:

“There was therefore a material element in the writing on which the minds of the parties had not met.”

Howard v. Burrow (Cal.) 245 P., 808, 810.

See also:

Daytona Gables etc. Co. v. Glen Flora etc. Co.
(Ill.) 178 N. E., 107, 117;

DeRemer v. Anderson, 41 Nev. 287, 169 P. 737,
738-739;

Spinney v. Downing (Cal.) 41 P., 797, 798;

L. R. A., 1917D, Note p. 1980.

“When it is shown that the parties intend to reduce a contract to writing, this circumstance creates a presumption that no final contract had been entered into, which can only be overcome by strong evidence. * * * The circumstance that the parties do intend that a written contract or memorandum of their agreement should be prepared and signed is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.”

Atlantic etc. Co. v. Robertson (Va.) 116 S. E.
476.

See also:

Mississippi etc. Co. v. Swift (Me.) 41 A.S.R.
545, 555.

“But it is not enough that the main features of the contract have been fixed by mail. If material terms, though subsidiary in their nature, have yet to be agreed upon, something in that case remains to be done besides the mere formal act of writing

out and signing the agreement. There has been no meeting of minds and no contract.”

122 *A.L.R.* 1258, note.

See also:

Esselstyn v. Meyer etc. Bank (Mont.) 208 P. 910, 913;

Beall v. Foster (Ore.) 186 P. 554, 555;

Cooperative Assn. v. Phillips, 56 Cal. 539, 547-548.

“It is generally held that, where the parties by their memorandum or series of letters indicates that another contract is to be entered into which will embody the precise terms on which they have agreed, or as to which they will agree, the contract is not sufficiently complete or certain to form the basis of an action for specific performance.”

Reeves v. Littlefield (Mont.) 54 P. (2d) 879, 881.

See also:

Dillingham v. Dahlgren (Cal.) 198 P. 832, 834.

“If the so-called contract leaves certain terms open for future negotiations between the parties it is evidently incomplete, and neither party can be compelled, in such future negotiations, to accept the offer of the adversary party. Specific performance is, accordingly, refused in cases of this sort.”

6 *Page on Contracts*, 2d ed., p. 5783, Sec. 8281.

In the case *infra* the parties left some of the terms of agreement to be settled at a subsequent meeting,

but the subsequent meeting never took place, and it was held there was no meeting of the minds with respect to the matters to be taken up at such subsequent meeting, which included the subject of feeding of hogs and trucks and for hauling equipment.

Place v. Parker (Mo.) 180 S. W. (2d) 538.

“If anything is left open for future consideration, the informal paper cannot form the basis of an agreement, where it is contemplated by the parties that there shall be a formal agreement prepared.”

122 A. L. R. 1255, note.

An agreement provided that a lease should not be binding if plans and specifications were not signed by landlord, tenant and mortgagee, and the condition was not complied with, subsequent oral agreement that submitted plans substantially carried out the contract, landlord's approval of plans and specifications, and landlord's agreement to go ahead with improvements, did not constitute a complete “contract” which could be made basis of right to tenant's action for specific performance since resort to the lease was essential to ascertain obligations of the parties.

Crawford Clothes v. 65 Bank Street Co.
(Conn.) 30 A. (2d) 914.

In the case *infra*, involving a covenant for renewal of a lease, it was provided that the rent should be stipulated according to the value of the property. Specific performance was sought but the court held that there was a want of any certain basis for the ascertainment of the rent to be paid. The court said:

“But who is to fix the value of the property?” and continued:

“Certainly each party would have the right to do it for himself, in the absence of any other stipulation. I know of no rule of law which can compel a party to change his estimate of the value of his property, when by contract he has the right to determine it for himself.”

The court concluded that there was no test by which certainty could be attained, and reversed a judgment decreeing specific performance.

Morrison v. Rossignol, 5 Cal. 64, 65-66.

The case *infra* involved a contract for the purchase of a tract of land in Fallon, Nevada, of which contract specific performance was prayed. Decree went for the plaintiff and on appeal it was urged on behalf of the appellant that the contract was too uncertain to be enforced. In affirming the decree the court, on this point, said:

“Is the agreement in question so ambiguous as to render it incapable of enforcement? There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain or indefinite” (citing authorities).

Dodge Bros., Inc. v. Williams Est. Co., 52 Nev. 364, 287 P. 282, 283, 284.

See also:

Conas v. Sullivan (Mass.) 145 N. E. 529, 530;
H. M. Weill Co. v. Creveling (App. Div.) 168 N.Y.S. 385, 386.

The case *infra* is closely in point. The court held that a memorandum agreement for sale of land which fixed the purchase price and the date of transfer, but provided that the sum to be paid on signing the contract on fixed date was to be agreed upon, was incomplete and unenforceable where parties did not reach the contemplated agreement, and held further that when any material element of a contemplated contract is left to negotiations, there is no enforceable contract irrespective of the statute of frauds.

Ansorge v. Kane (Ct. of App., N. Y.) 155 N. E. 683, 684-685.

An agreement, termed an "application" and referred to in the court's opinion as a "preliminary agreement" between owner and proposed lessee provided *inter alia* that

"apartment to be redecorated throughout to tenant's selection. Selection of colors will be made after lease is signed".

The court held said clause made the paper too uncertain to constitute a contract and we excerpt from the opinion:

"There is nothing in the application to justify a conclusion there was a union of the minds of the parties as to the terms of the lease. * * * Whether the * * * rental was to be paid in advance or at the end of the term, or in quarterly or monthly installments, * * * does not appear. The matter of decoration and selection of colors was also incompletely referred to. * * * It left the character and extent of the decoration undefined and it cannot be determined to a certainty * * *

whether the decoration was to be paid for by the landlord or by the tenant. * * * 'Selection of colors will be made after lease is signed,' clearly indicates that a lease was to be signed. * * * Nothing was stipulated as to how or when the rent should be paid. Nothing was said as to how long a period of grace for non-payment of rent would be allowed, or as to whether the landlord expected the proposed tenant to agree to confess judgment for the rent payable for the entire term in case of default and to waive exemptions in that confession of judgment, or as to how the landlord should acquire possession of the premises in case of default, or as to whether the lease would be automatically renewed at the end of the term. No reference was made to light, heat, and water, or to the respective rights and obligations of the parties should the apartment be destroyed or damaged by fire. It is not unusual for persons to agree to negotiate with the view of entering into contractual relations and to reach an accord *at once* as to certain major items of the proposed contract and then later find that on other details they cannot agree. In such a case no contract results. (Emphasis by the court.) * * * In the instant case the conclusion is inescapable that the 'application for lease' was a mere offer by the applicant of himself as a possible tenant * * * if * * * he and the latter's representative would meet and execute a lease *provided they could both agree on all the necessary stipulations, in addition to the two stipulations* (term and aggregate rental) as to which there was preliminary accord.'" (Emphasis supplied.)

Upsal Street R. Co. v. Rubin (Pa.) 192 A. 481, 483, 484.

THE SEPTEMBER 24, 1945 DOCUMENT PROVIDES: "THAT SAID LEASE SHALL PROVIDE * * * THE SECOND PARTIES (MAPES, JR. AND DENSON) WILL AT THEIR OWN COST, NOW ESTIMATED AT \$150,000.00 PROVIDE AND PLACE IN SAID STRUCTURE SUCH FURNITURE, FIXTURES AND EQUIPMENT AS SHALL BE SUITABLE, PROPER AND NECESSARY TO FURNISH AND EQUIP THE SAME AS A FIRST CLASS HOTEL AND APARTMENT BUILDING."

Who is to determine terms or conditions as to what is "suitable" or "proper" or "necessary"? That said clause creates such an uncertainty as to preclude specific performance, we say is established law. The authorities cited by us herein as to uncertainty as to the other phases are equally applicable here. Below are cited a few additional.

Woods v. Mathews (Mass.) 113 N. E. 201, 31 A.L.R. 507.

"Mutually agreeable" as to future contract makes it uncertain.

American etc. Co. v. Letton (C.C.A. 2d), 9 F. (2d) 799, 801.

THE DESCRIPTION IN THE SEPTEMBER 24, 1945 DOCUMENT DOES NOT SPECIFY OR INCLUDE THE BASEMENT, UNLESS THE TERM "GARAGE" IN THE FIRST PREAMBLE BE DEEMED TO REFER TO BASEMENT, AND SO WITH THE CLAUSE--"IF THE LEASE IS TO INCLUDE THE GARAGE, THEN THE SECOND PARTIES SHALL PAY MONTHLY 10% OF THE GROSS GARAGE RECEIPTS, OR, IF THE FIRST PARTY LEASES THE GARAGE TO A THIRD PERSON, THE SECOND PARTIES ARE TO HAVE THE PRIVILEGE OF GARAGE SERVICE FOR THEIR GUESTS ON TERMS TO BE MUTUALLY AGREED UPON."

We contend the uncertainty as to the garage and particularly the clause plaintiff and Mapes, Jr. were

to "have the privilege of garage service for their guests on terms to be mutually agreed upon", creates an uncertainty rendering specific performance impossible. We say also that it shows there was no agreement on that subject and hence the so-called contract never became a binding or legal contract. The authorities elsewhere cited are also applicable here, but we call attention to a few additional which seem specially in point.

Shepard v. Carpenter (Minn.), 55 N.W. 906;

49 *Am. Jur.* 45, Sec. 32 and N. 2 citing: 49

A.L.R. 1461 and note;

Gilman v. Brunton (Wash.), 161 P. 835.

EXHIBIT C IS SO UNCERTAIN AS TO THE CHATTEL MORTGAGE CLAUSE AS TO PRECLUDE SPECIFIC PERFORMANCE. THE CLAUSE READS: "THAT SAID LEASE SHALL PROVIDE THAT THE SECOND PARTIES ARE TO EXECUTE AND DELIVER TO THE FIRST PARTY A FIRST CHATTEL MORTGAGE COVERING THE FURNITURE, FIXTURES AND EQUIPMENT PLACED IN THE HOTEL AND APARTMENTS AS AFORESAID, TO SECURE THE RENTAL PAYMENTS AS PROVIDED IN SAID LEASE."

The terms of chattel mortgage are left uncertain as to what shall be at mortgagors' cost; as to provisions for insurance, keeping equipment, furniture, etc. up by replacements; interest on deferred rental payments, if any, and if so, at what rate; remedies in case of default, etc.

In said agreement nothing is said as to the chattel mortgage property being insured by the mortgagors, nor as to the rate of interest payable on the moneys

therein provided to be secured, etc. Uncertainty as to the matter of interest payable on said chattel mortgage is a ground for denying specific performance.

See:

49 *Am. Jur.* 46, Sec. 33 and N. 19 citing: 37 A.L.R. 376 note;

58 *C. J.* 938, Sec. 101 and N. 76 citing: *Burnett v. Kullak* (Cal.), 18 P. 401;

Blackmore-Danzig Co. v. Sillsbee, 225 N.Y.S. 767;

Magee v. McMannus (Cal.), 12 P. 451.

Where the contract was silent as to whether property was to be conveyed by deed with mortgage back, or by title retaining contract, or by outright conveyance without security; time of possession; remedies on purchaser's default; taxes and insurance; time of payment of interest; and place of payment, the court held that this did not justify specific performance by a prospective purchaser.

Reeves v. Littlefield (Mont.), 54 P. (2d) 879.

See also:

Manning v. Ayres (C.C.A. 7th), 77 F. 690, 696;

Schmidt v. Malavagos (Ohio), 187 N.E. 793;

Pomeroy, Spec. Per., 3rd ed. 406, Sec. 159—

Notes.

In the case *infra* the court was construing a provision in a contract that required among other things a mortgage to be executed. The court said "For how long is the mortgage to run?" "At what rate of interest?" The court says it was left in the dark as to

the terms of the mortgage the party was to give and concluded that the agreement was too indefinite and uncertain to support a judgment for specific performance and affirmed a judgment of the lower court sustaining a demurrer.

Burnett v. Kullak (Cal.), 18 P. 401, 402.

See also:

Keys v. Klitten (Wash.), 151 P. (2d) 989, 993-997;

Upsal S.R. Co. v. Rubin (Pa.), 192 A. 481, 483, 484.

See to same point:

McKibbin v. Brown, 14 N.J. Eq. 13;

Greenleaf v. Blakeman, 56 N.Y.S. 76; modified: 58 N.Y.S. 76;

Blanchard v. Detroit etc. Co. (Mich.), 18 A.R. 142, 155;

Nolan v. Grimm (Ida.), 173 P. (2d) 74, 76—recent and important;

Louisville etc. Co. v. Bodenschatz (Ind.), 39 N.E. 703.

THE EXHIBIT C INSTRUMENT SHOWS ON ITS FACE THAT THE PARTIES DID NOT INTEND SAME TO CONSTITUTE ANY BINDING AGREEMENT FOR A LEASE BECAUSE THEY PROVIDED THAT: "THE SAID LEASE SHALL * * * DEFINITELY SET FORTH ALL USUAL OR NECESSARY CONDITIONS TO THE END THAT THE RIGHTS AND INTERESTS OF EACH PARTY SHALL BE PROPERLY CONSERVED AND PROTECTED.

Provision re "necessary conditions" would require court to determine what conditions were "necessary."

In the case *infra* the agreement was to give a lease "satisfactory to both of us, but based upon the earning capacity of the hotel". The court held document too uncertain and meaning nothing more than that the lessor and the lessee at some future time should agree on the terms of the lease before it should be made. The "earning capacity of the hotel" was held too indefinite.

Bevan v. Templeman (Ore.), 26 P. (2d) 775, 778.

See also:

Eads v. Carondelet, 42 Mo. 113.

In the case *infra* the agreement contained the following:

"The terms and conditions pertaining to this are to be agreed upon later by us, but are to be in the bounds of reason and on about the same basis as have been customary in similar deals before by other people".

The court said this clause made the agreement so uncertain as that there was no contract at all.

Beall v. Foster (Ore.), 186 P. 554, 555.

“Allowable expenditures” make contract too indefinite to be specifically enforced.

Patch v. Anderson, (Cal.), 151 P. (2d) 644, 646.

“Usual clauses in lease to rebuilding”, was included in a memorandum of agreement to lease store, but the court held that the quoted clause made the agreement so uncertain that no specific performance could be had, nor even an action for damages for the breach.

Wineburgh v. Gay (Cal.), 150 P. 103, 104.

See also:

Palmer v. Pokorny (Mich.), 186 N.W. 505; 31 A.L.R. 506—Note.

Pomeroy's Specific Performance of Contracts, 3rd ed., 402, Sec. 159 contains an elaborate discussion on the subject of certainty of contracts, in which there is a clause re “necessary”, and in the notes is found the following:

“Contract for sale of an estate, vendor reserving ‘the necessary land for making a railway’ through the estate to a place named, held, in action for a specific performance by the vendor, that the reservation was so uncertain, that it made the contract incapable of enforcement.

Agreement for ‘satisfactory security’ too uncertain; agreement to lease right to remove sand ‘the sand to be taken from places to be agreed on from time to time’, too uncertain”.

EXHIBIT C (R. pp. 911-912) PROVIDES: "IF THE LEASE IS TO INCLUDE THE GARAGE, THEN THE SECOND PARTIES SHALL PAY MONTHLY 10% OF THE GROSS GARAGE RECEIPTS, OR, IF THE FIRST PARTY LEASES THE GARAGE TO A THIRD PERSON, THE SECOND PARTIES ARE TO HAVE THE PRIVILEGE OF GARAGE SERVICE FOR THEIR GUESTS ON TERMS TO BE MUTUALLY AGREED UPON.

The document affords no test as to whether the "garage" referred to is to be a part of the proposed structure, or situated on separate premises.

Inclusion of the garage in the proposed lease apparently is optional, but if Mrs. Mapes leases the garage to a third person, Mapes and Denson shall have privilege of garage service for their guests on "terms to be mutually agreed upon". How specifically enforce such clause?

We have elsewhere cited and quoted from authorities to the point that such clause "terms to be mutually agreed upon" and similar provisions in preliminary agreements render the same void, or in any event, incapable of specific performance. In addition, we specially call attention to the following:

In the case *infra*, a land option contract provided that the purchaser was authorized to enter into contracts for the sale of property under such terms which may be mutually agreed upon by the parties thereto, and it was held that said terms not being definite and certain, either as to consideration to be paid or the time of payment, but left to future agreement, the contract was void.

Esselstyn v. Meyer etc. Bank (Mont.), 208 P. 910, 913.

Specific performance suit. Complaint was dismissed and plaintiff appealed. The contract sought to be enforced was for sale of land and was fairly complete, except for the last clause which read:

“It is understood that the ultimate purchasers and the undersigned will work out the details of the apportionment of mortgages, release clauses, etc.”

And it was contended by defendants that said clause made the contract unenforceable, on which point the court said:

“The last clause of the contract provides that the Glen Flora Company and the ultimate purchasers will work out the details of the apportionment of mortgages, release clauses, etc. These are mere details to be finally agreed upon by the vendor with the purchasers. If a decree for specific performance should be rendered, how can the court decree what the Glen Flora Company must do under this provision of the contract? Though a contract in writing to convey real estate may clearly and definitely describe the property agreed to be conveyed, it cannot be specifically enforced if it does not give an absolute right to conveyance without further negotiation thereon.”

Daytona Gables etc. Co. v. Glen Flora etc. Co.
(Ill.), 178 N.E. 107, 117.

The case *infra* appears to be very closely in point. We excerpt:

“ ‘Although a promise may be sufficiently definite when it contains an option given to the prom-

isor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.' ”

Williston on Contracts (2d Ed.), Vol. I, Sec. 45, cited and quoted per supra:

Anderson & Brown Co. v. Anderson (C.C.A. 7th), 161 F. (2d) 974, 977; decided May 23, 1947.

**WHERE AN ESSENTIAL ELEMENT IS RESERVED FOR THE
FUTURE AGREEMENT OF THE PARTIES NO LEGAL OBLI-
GATION ARISES UNTIL SUCH FUTURE AGREEMENT.**

See on point:

Williston on Contracts, Section 45;

Restatement of the Law of Contracts, Section 32;

Elkhorn-Hazard Coal Co. v. Kentucky etc. Corp. (C.C.A. 6th), 20 F. (2d) 67;

Friedman v. Bergin (Cal.), 131 P. (2d) 13.

In *Wynne v. McCarthy* (C.C.A. 10th), 97 F. (2d) 964, the contract involved, among other things, had the following clause:

“That portion of the stock which shall be considered sold and that portion which shall be considered consigned shall be designated specifically agreed upon at the time said property is removed from the cars at Wortham, Texas.”

The court in stating that the contract thereby reserved an essential element for the future agreement of the parties, said:

“Where an essential element of a contract is reserved for future agreement of the parties, no obligation arises until such future agreement is consummated.” (Citing cases.)

In *Savannah Guano Co. v. Fogle* (S. C.), 100 S. E. 59, the court said:

“Can a party be mulcted in damages for refusing to make a contract, even though he has promised to do it, when the terms of the contract have not been agreed upon? Until the terms have been agreed upon there can be no contract.”

See, also:

Boatright v. Steinite Radio Corp. (C.C.A. 10th), 46 F. (2d) 385;

Woods v. Matthews (Mass.), 113 N. E. 201.

Radkinsky Administrator v. Ahlswede, 185 Ill. App. 513.

This was an action of covenant based on a sealed instrument. The instrument provided that Ahlswede, who was the owner of a certain lot situated in Chicago, would build a building on a lot, which was to cost in the neighborhood of \$30,000, and to be finished on or before September 1, 1919. This building was to be erected “upon plans to be drawn by Fromann & Jensen”. The agreement was specific as to the rental and other provisions to be incorporated into the lease. The court in holding that no binding contract was entered into says:

“If an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void, for neither the court nor the jury can make an agreement for the parties. Here all that was shown to the plaintiff at or before the writing under seal was executed was a sketch of the front of the building and a ground floor plan. Neither the sketch nor the floor plan contains any sections or detailed drawings. The writing declared on states that the building is to be erected ‘upon plans to be drawn by Fro-mann & Jebsen’, and the plans were not drawn until a month or longer after the writing declared on was executed. The writing makes no reference to specifications. We do not think that it can be ascertained with any reasonable certainty from the writing taken in connection with the sketch and floor plan shown to the plaintiff before the writing was executed, the kind of a building the parties agreed should be built, and that this is an uncertainty which must prevent a recovery by the plaintiff.”

American Merchant Marine Ins. Co. v. Letton
(C.C.A. 2nd), 9 Fed. (2d) 799, cert. denied
271 U. S. 668.

The court says:

“If the terms are left open to be settled in the future at conferences or negotiations between the parties, the minds of the parties have not fully met, and, until they have, no court may undertake to give effect to those stipulations that have been settled or to make an agreement for the parties respecting those matters that have been left unsettled.”

In addition to the above decisions the following are cases in point concerning the validity of an agreement to make a contract in the future: *Jenkins v. King* (Ind. App.), 61 N. E. (2d) 474, an agreement to make an agreement cannot be enforced; *Fisher v. Long* (Ky.), 172 S. W. (2d) 574, there is no legal obligation if an essential element of the contract is reserved for future agreement; *DiGiovanni v. Garfinkle*, 42 N.Y.S. (2d) 414, where there is merely an agreement to agree on vital elements of a contract the contract is unenforceable; *Cowan v. Selmon* (Ala.), 13 So. (2d) 190, an agreement to enter into a contract upon terms to be afterwards settled is incomplete on its face and amounts to nothing; *Radford v. McNeny* (Tex. Com. of App.), 104 S. W. (2d) 472, unless an agreement to make a future contract is definite and certain on all subjects to be embraced it is nugatory; *Wallace v. Mertz* (Ind. App.), 156 N. E. 562, an agreement to make an agreement is unenforceable; *Rosenfield v. U. S. Trust Co.* (Mass.), 195 N. E. 323, an agreement to reach an agreement imposes no obligation on the parties thereto; *Duffield & Co. v. Ellsworth*, 255 N.Y.S. 716, a contract for publication of a book on a date to be mutually agreed upon held to create mere agreement to agree resulting in failure of contract where parties never agreed as to date; *Wade v. Lutterloh* (N. C.), 144 S. E. 694, a contract to enter into a future contract must specify all material and essential terms of future contract; *Fly v. Cline* (Calif.), 193 Pac. 615, unless the agreement to execute a future contract is definite and certain upon all objects to be embraced, so that nothing is left for future

negotiation, it is nugatory; *Lucier v. Town of Norfolk* (Conn.), 122 Atl. 911, an agreement to make a contract upon such terms as may later be agreed upon creates no obligations.

See, also:

1500 Sherman Avenue etc. Corp. v. Perkovic,
255 Ill. 518.

**TO BE SPECIFICALLY ENFORCEABLE IN EQUITY, THE TERMS
OF A CONTRACT MUST BE EXPRESSED WITH CERTAINTY.**

Restatement of the Law of Contracts, Section
360, Uncertainty of Terms:

“Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.”

Noonan v. Mott, 194 N.Y.S. 502, aff. 194 N.Y.S.
962:

This was a motion for judgment on the pleadings by defendant. Plaintiff sued for specific performance of an agreement to enter into a lease upon which the plaintiff had paid \$5000.00. Defendant admitted execution of the agreement and the receipt of \$5000.00, and that he had not returned any part thereof. Defendant claimed plaintiff was not entitled to specific performance because the agreement was not a lease and did not contain terms and conditions of the proposed lease. The agreement provided for the incorporation into the lease of the “usual clauses contained in long-time leases with respect to defaults, insurance,

public ordinances, etc., and covenant against nuisances, and appropriate clauses requiring the tenant to keep the premises in proper repair during the continuance of the lease and such other usual and appropriate clauses as shall be agreed upon." In its decision, the court says:

"The term 'usual clauses' is without meaning, because there are not set or standard clauses adopted by all persons who draw leases.

"The provision in the writing which relates to the incorporation of the 'usual clauses contained in long-time leases' might be regarded as of no effect but we are then met with the provision 'for such other usual and appropriate clauses as shall be agreed upon.' "

The court says that this paragraph must be given effect, and

"the effect which must be given to it is that the parties intended the final lease to contain provisions relating to defaults, insurance, public ordinances, etc., and providing for many other necessary and appropriate matters. In practice there are as many provisions relating to leases as there are parties and lawyers drawing them."

The court further says:

"An infinite variety of questions suggest themselves as flowing from the clause referred to above. The parties intended that many matters should be threshed out and subsequently incorporated in the lease, which was to be an important long-time lease for a period of twenty-one years. The parties intended to work out and agree upon many important provisions, which, in a general

way, they regarded as essential elements of the lease. In other words the parties signed a writing by which they agreed to make a lease. The terms of the lease, they did not define, though intending to arrive at a settlement of the terms in the future. Such a writing is an agreement to make a lease; not in law such a contract that it can be made the basis of an action for specific performance to enforce it." (Citing cases.)

The defendant's motion for judgment on the pleadings was granted.

In *Herley, Inc. v. Harsh, et al.* (Ohio), 22 N. E. (2d) 515, the court held that the purported contract involved was so incomplete and indefinite as to material terms that specific performance could not be decreed. The agreement provided, among other things:

"It is understood that a regular and customary form of lease shall be entered into which shall provide, among other things * * *"

With reference to this particular clause the court says:

"No evidence definitely establishes that there is a 'regular and customary form of lease' used in Toledo, and evidence as to the forms used does not warrant the inference that there is a 'customary form' which meets the legal requirements of certainty, uniformity and generality necessary to establish a custom recognized by law."

Continuing the court says:

"Just what the parties alluded to by the words 'which shall provide, among other things' is like-

wise uncertain. It may refer to the other things which would appear in 'a regular and customary form of lease,' or it might equally be inferred that the parties might have in mind other things not mentioned or referred to in this contract which they would incorporate in the lease when they came to draw it."

In *McLean et al. v. Fox* (Ohio), 177 N. E. 913, the court says:

"We think it is fundamental that specific performance will not be granted to enforce a contract unless the contract makes the precise act, which is to be done, clearly ascertainable."

The court also points out that performance is not enough if the contract is too indefinite to be capable of specific performance.

In *Conas v. Sullivan et al.* (Mass.), 145 N. E. 529, the court says:

"There cannot be specific performance of anything short of a completed contract. The bargain must be determined by a meeting of minds as to the essential terms before there can be a contract. No vital factors of it can be left to future negotiation. It must be wholly settled as to obligation and duty imposed before it can be ordered to be executed by chancery."

In *Daubmeyer v. Hunter* (Fla.), 98 S. 69, the court points out that specific performance of a contract for the lease of land is not a matter of right in either party, but a matter of sound discretion in the court. The court further says:

“It is fundamental that specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions and is incapable of being made so by the aid of legal presumptions or evidence of established customs.” (Citing cases.)

CONTRACT FOR SERVICES—LACK OF MUTUALITY OF REMEDY.

There are numerous decisions involving contracts for personal services wherein the person by whom services are performable is the complainant. In 135 *A.L.R.* p. 305, it is pointed out that:

“The rule denying specific performance of a contract of service where the employee is the complainant is in fact inseparable from the fundamental reason for its existence. Thus, because of the lack of mutuality of remedy it is ordinarily held that equity will refuse to decree specific performance of a contract for services so long as it remains executory, wherever it creates a duty from the plaintiff of such a confidential or personal nature that the court could not have enforced it at the instance of the defendant.” (Citing cases.)

See, also:

Solinsky et al. v. McPherson et al. (C.C.A. 9th), 45 F. (2d) 778;

Turley v. Thomas, 31 Nev. 181, 101 P. 568;

Moore et al. v. Heron et ux. (Cal.), 292 P. 136.

**THE MEMORANDUM REQUIRED BY THE STATUTE OF FRAUDS
WILL NOT SATISFY THE STATUTE WHERE ANY PART OF
THE INTENDED CONTRACT IS LEFT TO FURTHER NEGOTIATION.**

The defendants contend that the contract herein sued upon shows on its face that it is merely a preliminary agreement, and that further negotiations were clearly intended by the parties before any binding contract would become operative. If this written instrument upon which this action is brought contains provisions wherein it is provided that the parties will further negotiate, and of this it appears there can be no dispute, then it is clear that this written instrument is not sufficient under the statute of frauds. The rule is clearly expressed in Pomeroy's Specific Performance of Contracts, 3rd Edition, page 208 et seq., Section 86 as follows:

“The memorandum must contain the substantive terms of a concluded contract, as has already been shown. It will not satisfy the statute as being ‘the agreement or a note or memorandum thereof in writing’, where any part of the intended contract—i. e., of the very contract of which it purports to be a memorandum—is left to further negotiation and a fortiori when the entire arrangement is still in the condition of negotiation so that one party may withdraw; or where it leaves any term or terms of the contract for future settlement; or it contains only certain matters which have been agreed upon as the preliminaries to, or basis of, the intended contract, and not the final contract itself.”

“It has been held in so many cases that it may be deemed elementary that the writing must in-

clude all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it shall completely evidence the contract which the parties made."

Blackmore-Danzig v. Silsbee, 225 N.Y.S. 767, 773.

PROVISION IN PRELIMINARY AGREEMENT FOR RENTAL IS TOO VAGUE AND UNCERTAIN FOR SPECIFIC PERFORMANCE.

The clause in Paragraph 9 of the September 24, 1945 document requiring lease to provide for a guaranteed minimum income from entire building, of sufficient to cover "Taxes, upkeep, insurance, interest on borrowed money and to amortize cost of building" is too vague for specific performance,—no test as to what taxes, general or special; no test as to how "upkeep" shall be computed or determined, nor as to who shall decide what "upkeep" shall consist of, etc. No basis or test as to amount of insurance to be carried, hence no basis for amount of premiums to be paid; no basis for ascertainment of amount of "interest on borrowed money"; no statement of what the "borrowed money" refers to; no test as to limit or amount thereof; no test as to amount required to amortize cost of building in 20 years; no statement as to first cost (except mere estimate of \$800,000.00).

Further, it will be observed that as guaranteed minimum income the above clause purports to provide that

“total annual income from the entire building” will amount to at least sufficient to cover the items listed. Inasmuch as the proposed lease was only on a part of the building, i. e., it did not include eight store spaces on Virginia Street and three store spaces on First Street, a question of grave importance immediately arises as to whether the guaranteed total income clause was intended to apply against the “entire building” or only to the portion proposed to be leased to plaintiff and Charles W. Mapes, Jr. The rental from the eleven store spaces taken (for sake of argument) at \$1000.00 per month each, would be \$11,000.00 per month or \$132,000 per annum. It is impossible to determine from the said document whether such item was intended to be included or excluded. If included, then Denson and Mapes as guarantors would be put in the position of guaranteeing income from a substantial portion of the building to which their lease did not extend. If not included, how reconcile the clause “from the entire building”?

Here again, the authorities elsewhere cited herein on uncertainty are applicable to the above. Additionally we cite:

“To warrant a decree of specific performance thereof, a contract must be definite and certain, and free from doubt, vagueness, and ambiguity, in its essential elements and material terms. Clearness is required. The terms of the contract must be so clear, definite, certain, and precise, and free from obscurity and self-contradiction, that neither party can reasonably misunderstand them, and the court can understand and interpret them,

without supplying anything or supplanting vague and indefinite terms by clear and definite ones through forced or strained construction.”

58 *C. J.*, 930, Sec. 96 and Notes 7-18 citing, with other cases:

Shaw v. King (Cal.), 218 P. 950.

See, also:

Pomeroy's Spec. Performance, 3rd ed., 376, Sec. 145;

Id. p. 406, Sec. 159;

Id. p. 408, Sec. 160;

Boulenger v. Morrison (Cal.), 264 P. 256.

Cooperative Assn. v. Phillips, 56 Cal. 539, 547-548.

So, in the case *infra* involving a contract to lease for ten years at an “average monthly rental of \$845.00 per month to be graduated” was held too vague for specific performance,—it not being shown how the rental was to be graduated.

Meyer v. Lincoln Realty Co. (Cal.), 113 P. 333.

In the case *infra* the alleged contract was to pay for plaintiff's services in the stock of the corporation, but contract did not designate the number of shares, and it was held that it was not a proper subject for specific performance.

Oliver v. Little, 31 Nev. 476, 103 P. 240.

Insurance, amount not stated, nor right of parties to proceeds in case of loss. See:

Blackmore-Danzig Co. v. Silsbee, 225 N.Y.S. 767.

Where matter of a new store front, payment for heating and other similar matters had not been agreed upon, there was no binding agreement to lease store.

Rosenfield v. U.S. Trust Co. (Mass.), 195 N.E. 323.

See, also:

West etc. Corp. v. Adelman (N.J.), 152 A. 196.

In the case *infra* the court, considering an uncertain contract, referred to the rule being elementary that specific performance would not be enforced unless the contract not only contained all the material terms, but also expresses each in a sufficiently definite manner.

Reymond v. Laboudigue (Cal.), 84 P. 189, 190.

The failure of a contract to provide the rate of interest on a mortgage or deferred payments renders the contract so uncertain as to defeat specific performance.

58 C. J. 938, Sec. 101 and N. 76 citing:

Burnett v. Kullak (Cal.), 18 P. 401;

Magee v. McMannus (Cal.), 12 P. 451.

Covenants which leave the amount of price to be fixed by future agreement between the parties have generally been held unenforceable and void for uncertainty and indefiniteness.

30 A.L.R. 573—extended note reviewing cases pro and con.

“If the terms of a contract are contradictory and conflict with each other in their effect, and when

there are two different agreements between the parties concerning the same subject matter, the necessary result is an uncertainty which prevents a court of equity from decreeing a specific performance”.

Pomeroy's Spec. Performance, 3rd ed., 408, Sec. 160.

THE SEPTEMBER 24, 1945 DOCUMENT IS UNCERTAIN AS TO ANY REMEDIES AVAILABLE IN THE EVENT OF DEFAULT IN PAYMENT OF RENTAL, I.E., WHETHER LEASE SHOULD BE TERMINATED, ETC.

Our contention as to uncertainty respecting other features of the so-called agreement of September 24th, and the argument and authorities elsewhere made and cited apply here. Said agreement contains nothing as to what remedies are available to either upon default by the other. We add:

In the case involving an alleged uncertain contract, the court said

“What could the court direct or provide in its decree with reference to the failure of the purchaser to make his payments or to pay the interest?”

Reeves v. Littlefield (Mont.), 54 P. (2d) 879, 882.

See, also:

Manning v. Ayres (C.C.A. 7th), 77 F. 690, 696;
Schmidt v. Malarogos (Ohio), 187 N.E. 793.

THE PRELIMINARY AGREEMENT CALLS FOR CONSTRUCTION BY DEFENDANTS OF A LARGE HOTEL BUILDING, ESTIMATED COST \$800,000.00, WITH PLAINTIFF AND CHARLES W. MAPES, JR. TO OPERATE AND MANAGE SAME.

This, as we believe, would call for continuous supervision by the court during construction if specific performance were decreed, and for performance of personal services in management for the term of the lease. That this will not be done by a court we submit the following:

The law is that a contract which can be performed only by rendering personal services as a contract to manage a theatre, to open, develop or operate a mine, to quarry marble blocks at a specified size, shape and quality, to operate a saw mill, to operate a railway line, to construct a railway line,—all of them are contracts of which specific performance will not be given, since decrees to perform them cannot be enforced by the courts without an expenditure of time and energy which may seem to the court to be excessive.

6 *Page on Contracts*, 2nd ed., 5883, Sec. 3354 and N. 7 et seq.

Sec, also:

31 *A.L.R.* 507—Note;

164 *A.L.R.* 815—Note.

The case *infra*, a recent case decided May 13, 1946, was an action seeking specific performance of an agreement for distribution of calculating machines manufactured by the defendant. The court granted the defendant's Motion to Dismiss and plaintiff appealed. After disposing of a number of other contentions, the court said:

“When we come to consider the efficacy of equity to grant relief, we meet our greatest difficulty. It has been the rule that equity will not grant specific performance of a contract so indefinite in its terms as to require continuous policing of performance and when obedience to a decree may not be compelled by ordinary court process.”

Bach v. Fiaden Calculating etc. Co. (C.C.A. 6th), 155 F. (2d) 361, 366.

“As a general rule, courts of equity refuse to decree specific performance of a contract where its provisions and stipulations are so multifarious and its obligations are so continuous as to make the effective enforcement of a decree impossible, or require constant and long continued supervision by the courts and further supplemental proceedings in order to enforce the defendant’s compliance with the decree and his performance of the constantly recurring duties of the contract. This is particularly true where performance will extend over a considerable period of time and include a series of acts as in the case of a building and construction contract.”

49 *Am. Jur.* 85, Sec. 70 and N. 5, 6, 7.

See, also:

Stanton v. Singleton (Cal.), 59 P. 146; 47 L.R.A. 334.

Query: Could Mrs. Mapes compel specific performance of execution of a lease by Mapes, Jr. and Denson, which lease called for the operation by the latter of the hotel and hence call for the performance of their personal services? If not, then Denson and

Mapes, Jr. would have no remedy for specific performance against Mrs. Mapes because there would be no mutuality of remedy. See:

65 *A.L.R.*, 45—extended note;

Jacksonville Hotel Co. v. Dunlap Hotel Co.,
264 Ill. App. 279, 321.

The testimony of plaintiff (R. pp. 189, 861) is: "I was really to be the manager of it (the hotel)".

If the foregoing be accepted as true, then it would appear plaintiff is out of court on his own showing, because admittedly no specific performance could lie by the defendants as against plaintiff P. G. Denson, because the management and conduct of the hotel calls for personal services, and it is equally well settled that equity cannot take jurisdiction unless the contract is of such a nature that it can be specifically enforced by each of the parties against the other, i.e., that there must be mutuality. See:

Cooper v. Dena, 21 Cal. 403.

See also further authorities to same point:

Marshall v. Thorson (Colo.), 197 P. 754, 755—
an hotel case and closely in point;

Folquet v. Woodburn Public School (Ore.),
29 P. (2d) 554, 555;

Blanchard v. Detroit etc. Co. (Mich.), 18 A.R.
142, 150;

Moody v. Crane (Ida.), 199 P. 652, 658;

Tri-State Const. Co. v. Watts (Ark.), 237 S.W.
690;

Clarno v. Grayson (Ore.), 46 P. 426, 437;

Standard etc. Co. v. Siegel-Cooper Co. (N.Y.),
 68 A.S.R. 753, 754—important case;
 140 A.S.R. 59—Note; Id., 76—Note;
Allegheny Club v. Bennett (C.C.Pa.), 14 F.
 257, 258;
Ross v. Union P. R. Co., 20 Fed. Cas., p. 1245,
 No. 12080;
 68 A.S.R. 755, 760, 761—Note;
Los Angeles etc. Co. v. Occidental Oil Co.
 (Cal.), 78 P. 25, 27.

PLAINTIFF'S AMENDED COMPLAINT AND TESTIMONY SEEK
 SPECIFIC PERFORMANCE OF AN AGREEMENT UNDER
 WHICH HE IS TO PERFORM PERSONAL SERVICES, VIZ.,
 MANAGE AND CONDUCT SAID HOTEL. DEFENDANTS
 COULD NOT COMPEL PLAINTIFF TO PERFORM SUCH PER-
 SONAL SERVICES. HENCE NO MUTUALITY OF REMEDY.

“* * * it is a fundamental principle in the law
 of specific performance that for the relief to be
 granted mutuality of remedy must exist.”

58 C. J., 866, Sec. 19 and N. 17, citing long list
 of cases.

See also:

Pomeroy's Spec. Performance, 3rd ed., 422,
 Sec. 165;

Gavina v. Smith (Cal.), 148 P. (2d) 890.

The defendants could, as we believe, under no cir-
 cumstances compel specific performance by the plain-
 tiff of the September 24th document, if for no other
 reason, in that there is no mutuality because the de-
 fendants could not compel the plaintiff to manage

and operate the hotel because that would be requiring him to perform personal services.

“The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other.”

Hupp v. Lawler (Cal.), 288 P. 801, 803.

The contract purports to require of the Mapes, Jr.-Denson side personal services in the operation of the hotel. The law is that a contract which can be performed only by rendering personal services as a contract to manage a theatre, to open, develop or operate a mine, to quarry marble blocks at a specified size, shape and quality, to operate a saw mill, to operate a railway line, to construct a railway line, are all of them contracts of which specific performance will not be given, since decrees to perform them cannot be enforced by the courts without an expenditure of time and energy which may seem to the court to be excessive.

6 *Page on Contracts*, 2nd ed., 5883, Sec. 3354 and N. 7 et seq.

See also:

31 *A.L.R.*, 507—Note.

In the case *infra*, it appeared plaintiff orally agreed to bequeath her property to defendant on the latter's agreeing to marry plaintiff and manage her property, and the court held that specific perform-

ance was not available to the defendant, since the defendant could not be compelled specifically to manage plaintiff's property.

O'Brien v. O'Brien (Cal.), 241 P. 861, 865.

For exhaustive treatment on the subject of mutuality, see:

6 *Page on Contracts*, 2nd ed., 5824, Sec. 3308 et seq.

PLAINTIFF'S SO-CALLED PLEA (SEE PARAGRAPHS IX, X, XI AND XII, AMENDED COMPLAINT) OF WAIVER OF THE CLAUSE IN THE SEPTEMBER 24, 1945 DOCUMENT REQUIRING PRECEDENT WRITTEN APPROVAL BY BOTH PARTIES OF PLANS AND SPECIFICATIONS BEFORE ANY LEASE SHALL BECOME EFFECTIVE, AND PLAINTIFF'S CLAIM OF PART PERFORMANCE AND ESTOPPEL—ARE INSUFFICIENT FOR WANT OF NECESSARY FACTS.

The Nevada statute provides:

“Every contract for the leasing for a longer period than one year, or for the sale of any land, or any interest in land, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party by whom the lease or sale is to be made.”

Vol. 1 *N. L. C.*, Sec. 1529.

It will be noted the statute *supra* makes the contract “void.”

In the case *infra*, the Washington Statute made contracts of a similar nature “void”. On the trial, it was sought to show that there had been a waiver and estoppel, etc., but the Washington Supreme Court

held that because of the provision making the contract void, no such defense was available, in absence of part performance.

Chambers v. Kirkpatrick (Wash.), 253 P. 1074, 1075, reversed on other grounds, 259 P. 878.

See also:

49 *Am. Jur.*, 730, Sec. 425.

“If in an action on an oral contract plaintiff relies on part performance, receipt, and acceptance, or other circumstances to avoid the statute or bring the case within an exception thereto, he must allege such facts as will effect that purpose.”

37 *C. J. S.*, 798, Sec. 27 and N. 56, citing cases.

“A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal.

To establish an estoppel precluding reliance on statute of frauds as defense to action for breach of oral contract, essential terms of contract must be shown with reasonable certainty and it must be shown that representations were made that invalidity of contract would not be asserted, together with facts that party urging estoppel has thereby changed his position to his detriment, and that intention to make change was known at time by one making representation.” (syll.)

Albany etc. Co. v. Euclid etc. Co. (Cal.), 85 P. (2d) 471.

For opinion covering same subject matter see:

Idem., pages 472-473, citing cases.

To same effect:

Little v. Union Oil Co. (Cal.), 238 P. 1066,
1068.

The modification alleged or attempted to be alleged by the plaintiff of the September 24th written document are modifications in the nature of recession by the defendants of their rights under the original agreement, while no new obligations are required of or are to be performed by the plaintiff. This is insufficient for specific performance.

Bamberger Co. v. Certified Productions (Utah),
48 P. (2d) 489, 492-493.

The case *infra* involved claimed modifications of a written lease which had previously been made for the period of 10 years. Plaintiff sued defendant corporation as a lessee for restitution of the premises for default, etc., in payment of the rent. The defendant set up that there were supplemental agreements which modified the original lease. It appeared these supplemental agreements were oral and plaintiff moved to strike same. Judgment went for plaintiff and defendant appealed, and in reversing, the Utah Supreme Court said, *inter alia*:

“As a broad general doctrine it may be announced that a contract required by the statute of frauds to be in writing cannot be modified by subsequent oral agreement. * * * Most of the courts of this country hold, as a general rule, that an oral modification of a contract required

by the statute of frauds to be in writing will not be permitted.”

Bamberger Co. v. Certified Productions (Utah),
48 P. (2d) 489, 491-492.

See also:

17A.L.R., 10.

Where the oral contract is regarded as void under the statute of frauds, the defense of estoppel, waiver, etc. may not be set up, in absence of part performance of such oral contract.

37 C. J. S., Sec. 246 and Note 94 et seq.

“Part performance relied on to take the case out of the statute of frauds must have been done strictly with reference to the contract; if referable to anything else, it is not available.”

27 C. J., 347, Sec. 429 and Note 41 citing long list of cases.

NO FACTS SHOWING ESTOPPEL ARE PLEADED.

The case *infra* was an action to recover damages for breach of contract involving an oral contract whereby it was alleged defendant agreed to furnish plaintiff for a period of 5 years without charge sufficient horses to cultivate the land leased by a written lease by defendants to the plaintiff. The trial court allowed evidence as to the oral agreement over defendants' objection that the agreement was void under N.C.L., Sec. 1533 re agreement not performed within

one year. The trial court decided for plaintiff, but this was reversed on appeal, primarily on the ground that the doctrine of part performance relied upon by the plaintiff did not apply to contracts of the character in question, but only contracts relating to land. It was then contended on appeal that there was an estoppel by reason of acts of plaintiff done in reliance upon the oral agreement, but the court held that the facts fell short of showing any estoppel and reversed the judgment in favor of the plaintiff. Subsequently, a petition for rehearing was made and followed by an opinion denying same, from which it appears that the plaintiffs contended solely on the rehearing for an estoppel, based upon expenditures made by them in conducting their operations under their lease, the loss incident to defendants' refusal to furnish horses. Plaintiffs contended that if the outlay would not support the plea of part performance it should estop the defendant company from urging the statute of frauds. But the court ruled against plaintiff, saying the operations relied upon did not induce the change of position by plaintiffs but was the result of change of position. The court commented upon the failure of Brooks as to any change of position done in reliance upon the oral agreement. The trial court was reversed.

Nehls v. William Stock Farming Co., 43 Nev. 253, 184 P. 212, 185 P. 563.

In the case *infra* plaintiffs, having an established delivery business, took two contracts to carry United

States mail for a period of 4 years and made an oral agreement with defendants whereby defendants undertook to carry it for the remaining period and executed a written contract to that effect to plaintiffs who thereafter changed their residence, sold a part of their teams and took other teams away. It was held in an action for breach, where it was not shown that it was necessary for plaintiffs to change their residence after making the agreement, or that defendants were informed, etc. that they intended to make such changes, or that defendants had knowledge of any necessity therefor, that there was no estoppel. The court said:

“In the case at bar, it is not alleged that it was necessary for plaintiffs, or either of them, to leave Susanville when they ceased to carry the mails, or that they informed defendants that they intended to do so, or that they intended to change their residence or condition in any respect because of the proposed transfer, or that the defendants had knowledge of any such necessity or purpose. There is no evidence tending to show these facts, supposing them to have been pleaded, except the testimony of J. C. Long that he told the defendants before making the oral agreement that he had to go away because of his wife’s health and that after the agreement was made they sold two rigs and four horses and took the other equipment away ‘on the strength of the agreement that we made with the defendants’. He did not say that the defendants were informed at the time of making the agreement that they intended to do

this, or that they, at that time, had such intention. Or that J. C. Long would not have gone away for the sake of his wife's health, even if they had not made the agreement. There is therefore nothing upon which the supposed estoppel can rest."

Long v. Long (Cal.), 122 P. 1077, 1079.

In the case *infra* the court held that the contract presented was void under the statute in that it described the property only as "160 acres, more or less" in a certain township and range, county and state. Appellant apparently recognized the force of the decisions and had alleged facts designed to set up estoppel; that relying "upon the good faith and integrity of the defendant and his ability and willingness to perform * * * said contract" he, the appellant, spent time and money in cruising the timber on the land and in obtaining rights of way to it. But the contract being void, this was not sufficient to remove the ban of the statute of frauds. The case is comparable to the situation here, where the written document (as we contend) is void for uncertainty in a number of particulars, and the plaintiff's plea that he relied upon the good faith, etc. and performed divers things, is within the rule of the Washington case where it was said:

"But the contract being void, this was not sufficient to remove the ban of the statute of frauds."

Mortenson v. Cruikshank (Wash.), 101 P. (2d) 604, 605.

“The mere promise of the plaintiff to reduce the oral contract to writing, and her failure or refusal to do so did not constitute a fraud”.

O'Brien v. O'Brien (Cal.), 241 P. 861, 865.

“A parol promise to lease certain real estate for a term of years, on which defendant relied in purchasing a stock of goods on the premises, being a mere promise as to future action with respect to a right to be acquired under an agreement not yet made, is insufficient to estop plaintiff from denying the validity of such contract under the statute of frauds.”

Dechenbach v. Rima (Ore.), 78 P. 666.

“An estoppel cannot be relied upon to give effect to a contract absolutely void.”

27 C. J. 340, Sec. 425 and N. 72 and cases cited.

COMPLAINT MUST ALLEGE FACTS SHOWING CONTRACT SOUGHT TO BE ENFORCED WAS JUST AND REASONABLE TO THE DEFENDANT.

The case *infra* was for specific performance of an executory contract to give to the plaintiff a lease upon certain property. The complaint alleged in the language of the statute that the consideration was just and reasonable, etc., but the court held this was insufficient and for that reason alone reversed the case. The complaint should set forth the facts which show the consideration provided for in the contract sought

to be enforced is adequate and that the contract is just and reasonable to the defendant.

Joyce v. Thomasini (Cal.), 142 P. 67, 68-69.

For the reasons above discussed and on the authorities cited, the defendants and appellees ask that the judgment and decree of the trial court be in all respects affirmed.

Dated, Reno, Nevada,

December 10, 1947.

Respectfully submitted,

H. R. COOKE,

JOHN D. FURRH, JR.,

Attorneys for Appellees.

No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

VS.

IRENE GLADYS MAPES, also known as
Mrs. Charles W. Mapes, CHARLES W.
MAPES, JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-partner-
ship),

Appellees.

Upon Appeal from the District Court of the United States
for the District of Nevada.

APPELLANT'S REPLY BRIEF.

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FILED

DEC 29 1947

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**APPELLEES' BRIEF FAILS TO MEET THE ISSUES OF LAW,
EQUITY AND FACT TENDERED BY APPELLANT.**

The premise of appellees' brief is indicated under
the caption "Review of Appellant's Opening Brief"
(Br. page 3) as follows:

"Appellant's statement of the case, page 3, states
the parties entered into a written agreement 'for a
lease of a hotel'. We deny it and say it was a mere
preliminary agreement by the parties so declared by

them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provision in the contract.” Appellees’ categorical denial of our statement in the opening brief “that the parties entered into a written agreement for a lease of a hotel”, is an extraordinary and astonishing denial in the face of the facts. The question immediately arises, if the agreement was not for a lease of the hotel, what WAS it for? The agreement itself provides that the parties “contemplated a lease”, they manifestly declared that intention and purpose in the written document itself, and certainly their conduct, set forth in the statement of facts in our opening brief, which conduct has not been contradicted, clearly substantiates that intention. The trial court in its finding paragraph 14 (Tr. Vol. 2, pages 918-919), reached the same conclusion as follows: “That on or about April 10, 1946, the defendants (appellees here) *without good cause*, repudiated said written agreement and declined and refused further performance on their part under it and stated to plaintiff (appellant here) *that no lease would be tendered, granted or entered into as contemplated by said agreement.*” (Italics supplied.)

Further, if no lease was intended, why did the parties after continued negotiation enter into a solemn written contract definitely and unequivocally agreeing as to the essential and material terms to be contained in the lease? Why did the defendants (appellees here) demand a large deposit as an evidence of good faith, which the appellant advanced in the belief that they were acting in good faith? Was all this

done as a mere idle pastime, without legal force or significance? Was it the intention of the owner of the property, and her attorney, when she signed this written agreement, under the advice of her attorney, who had redrafted it, that the agreement was a mere vagrant paper to be torn up at will, that it had no binding force, that appellants' written commitment to lease for a stated term, to pay a stated rent, to pay a stated amount to furnish the hotel, to give a mortgage to guarantee the rental, the payment of taxes, upkeep, insurance, interest on borrowed money, and to amortize the debt within said lease period * * * may it be concluded that this written commitment, solemnly agreed upon by all parties, was nothing but a casual exercise in the practice of typewriting and penmanship? It is inconceivable how such an intention may be properly adjudicated from the facts of this case.

Appellees assert that "It was a mere preliminary agreement." They seem to imply some judicial contempt for a written solemnly executed agreement, just because it is preliminary to further action. There seems to be nothing ambiguous about the word "preliminary". It does not seem unfair to state that probably thousands of preliminary written agreements are negotiated in the American business world every day, but because they are preliminary, is there anything in law or equity which *ipso facto* nullifies them, or establishes them as unworthy of judicial consideration? Such is appellees' contention! And with a labored effort of a mass production of authorities, not one, cited in their brief, supports such a manifestly

illegal, inequitable and unconscionable position. Is it the intention of appellees' attorney, who advised upon and redrafted the agreement, presumably with meticulous care, to continue to maintain before this court upon the submission of this appeal, that the agreement, signed by all the parties and carefully witnessed, was of no legal force and effect, and that the ceremony of signing and delivery was but a fleeting fancy? If so, we are prepared to meet the issue. The construction placed by counsel upon this written agreement suggests the comment noted by Roscoe Pound, American Bar Association Journal, November, 1947, page 8, that this must be "spurious interpretation carried to the extreme."

Appellees, after denying it was an agreement for a lease of a hotel, assert that it was a "mere preliminary agreement by the parties so declared by them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provisions in the contract." (Br. page 3.)

Appellees ignore the fact that the trial court in its findings (Tr. Vol. 2, Par. 9, page 917) found that the agreement contained "terms, which were settled and agreed upon by said agreement of September 24, 1945." In a word, there was a definite meeting of the minds by all of the parties as to the settled and agreed terms to be incorporated in the lease. That as to these settled terms there was a definite contract, and manifestly all parties were bound. That by an abundance of authority cited in our opening brief (page 46 et seq.) it is well established law that such an agreement

containing the material and essential terms is sufficiently complete to warrant specific performance. Further, as to these essential terms, there was no "agreement to agree." As to them, it was a completed contract, manifestly so intended by the parties, and so determined by the findings of the trial court. And again, appellees ignore the prime intention of the parties as set forth in the agreement (Tr. Vol. 2, Paragraph 10, page 913) namely "that the said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto, as stated in the preliminary agreement, and also to set forth all usual and necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected."

Further, appellees ignore the fact that the material and essential terms to be incorporated in the lease, having been agreed upon, left only subsidiary and customary terms to be negotiated, which under the weight of well reasoned authority, cited in our opening brief, could not properly defeat specific performance.

Further, appellees attempt to evade the further fact, as found by the trial court and repeatedly referred to in our opening brief, that the appellees repudiated the agreement without good cause, deliberately broke their promise to further negotiate, scorned the appellant's undoubted rights under the agreement, and with the fault of repudiation adjudicated by the trial court to be theirs, appeal to this high court to uphold them in their established breach of faith. Appellees, in

their brief (page 3), assert that the “document never became a valid contract and that therefore there could be no “repudiation”. Here they clash with the finding of the trial court, quoted on page 8, par. (g) of our opening brief, wherein the court found, “That on or about April 10, 1946, the defendants, without good cause *repudiated said agreement* and declined and refused further performance on their part under it * * *” (Italics supplied.) If their reasoning be sound and their deduction justified, is their comment on the use of the word “repudiation” an admission that because of its use, in the finding, the trial court recognized the validity of the contract and that it had been “repudiated”? As we have repeatedly contended in our opening brief, the findings of the trial court clearly establish appellant’s cause of action and his right to specific performance, and that the conclusions of the trial court, in the face of the findings and the evidence, were erroneous and should be reversed. These findings clearly hold that as to the material and essential provisions of the lease, there was a completed contract. The qualifications and conclusions of the trial court that because further negotiations were contemplated, which under fair interpretation could only be subsidiary and customary, are unjustified in law or equity. And further, it being conceded and found by the trial court, that appellees deliberately without good cause prevented further negotiations and wilfully breached their contract, they were estopped from setting up the breach as a defense; and the trial court was in error in upholding this

illegal violation and protecting the appellees in this concededly broken promise.

Appellees' effort to place some fault on the appellant for a failure of negotiation (Br. page 5) may not be sustained by either the evidence or the findings. The court found that the defendants without good cause repudiated the contract. If the appellant had been at fault for failure to negotiate, which would have tended, at least, to excuse defendants' fault, the trial court undoubtedly would have so found. But the court was precluded from such a finding by the established uncontradicted evidence. Up to the very time of the repudiation, as is stated in our opening brief, the appellees had given no indication whatever to appellant that a lease would not be granted. Up to that moment, the parties were cordial. Conditions were apparently harmonious. The hotel was in course of construction. The sudden repudiation of the contract fell on the appellant like a blow in the night. With contemptuous disregard for their written commitments, their long association with the appellant and his whole-hearted co-operation, aid, invaluable experience and advice, they kicked him out. These are the blunt facts. They forced him to seek relief in a court of equity. And in defense of that suit, they contend that their written word meant nothing; that they never intended to respect their promises; that the written contract was camouflage to conceal some ulterior purpose, and that the ten thousand dollars they took from the appellant was merely a financial gesture to make him believe they were acting in good faith

as a "come on" for useful service and advice until they were ready to seek other fields of conquest.

**APPELLEES EVADE AN IMPORTANT POINT INVOLVED IN A
CONTRACT FOR A LEASE.**

Beginning at page 46 of our brief, we contend that a contract for a lease which contains the material and essential terms to be embodied in the lease is a completed contract, even though the parties contemplated the subsequent execution of a formal contract. This contention has been amply supported by respectable authority. These authorities further set forth what are the essential and material terms of a lease; and there is no question that these material and essential terms, and more, are contained in the contract under consideration here. They are set forth on page 19 of our opening brief. Appellees avoid this statement of law, equity and fact by declaring there was no contract, that it was a preliminary useless document because the parties agreed upon further negotiation, for what? If by fact and definition the material and essential provisions are admittedly set forth in the agreement, what was there left to negotiate? Obviously, subsidiary matters of relatively minor importance and matters customarily included in leases. This was undoubtedly what the parties intended, or they would not have been so scrupulously careful in setting forth the material and essential provisions in a solemnly executed, written and witnessed document. Appellees do not assert or argue in their brief what

this intention was. Having been confronted with litigation, they content themselves with broad statements that there was no contract, that if there was a contract it was only preliminary, that a preliminary contract is no good anyway, and always realizing it was no good anyway, they entered into it to put in time for an idle day.

No stronger pronouncement of the position of the appellees may be made than that set forth in the comments of one of the court citations noted in our opening brief. We again respectfully refer this court to the case of *West Heights Realty Corporation v. Adelman*, 152 Atl. 196, cited in our opening brief on page 23, very much like this case, and hardly given passing notice in appellees' brief. As the court noted there, and is so forcefully applicable here, that the position of the defendants, "seems to amount to a plain declaration that the entire contract was invalid in law and in equity; was a vain form; and that neither party acquired any rights of any kind under it."

**THE RULE IN NEVADA IN WHICH JURISDICTION
THE AGREEMENT WAS EXECUTED.**

There are two established principles of equity in Nevada controlling the remedy of specific performance, both of which have been noted in cases cited in our opening brief. (Br. page 63.) One is, that "Courts of equity ought to determine the rights of parties according to the broad principles of justice and fair dealing and not by the technical and refined

distinctions of the law". This is a fundamental doctrine, pronounced by the highest court of the state, in a specific performance case. If this doctrine is to apply here (*Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 82 L. Ed. 1188), on which side does justice and fair dealing lie? Will justice and fair dealing uphold the appellees in their wilful breach of a contract without good cause, will it condone their inequitable conduct toward the appellant, will it dismiss the appellant without right or remedy, or will it compel the appellees to perform their solemn obligations? If justice and fair dealing are the foundation stones upon which equitable doctrines are built, then the record in this case overwhelmingly establishes the equities in favor of the appellant.

The other established principle of equity as applied to specific performance cases in Nevada may be found in the case of *Dondero v. Turrillas*, 59 Nev. 374, 94 Pac. (2d) 276, cited in our opening brief (page 63). This doctrine is, we have repeatedly urged here, that if parties reach an agreement upon the *essential terms* of a lease, specific performance should be decreed. This opinion is a late expression by the Supreme Court of Nevada in a specific performance case. There was no express contract entered into, as in the instant case. The agreement was adjudicated on the basis of correspondence and oral negotiation. A lease was contemplated. To this end, a form of lease was submitted and exchanged by respective attorneys for the parties, but both attorneys refused to agree to the form proposed. The suit for specific performance

resulted. The point was raised there, as here, "that the memorandum was merely preliminary and that it was contemplated by the parties that something yet was to be done, that further conferences were to be had. But the trial court further found from the substantial evidence that on the evening of January 15, 1938, the parties reached an agreement "*and that the essential terms thereof were embodied in the memorandum and in the reference to the old lease.*" (Italics supplied.) (Citation from page 283 Pacific citation.) The Supreme Court affirmed the decision of the trial court, establishing the rule in Nevada that the essential terms in an agreement for a lease were sufficient to warrant specific performance. There, as here, there was a preliminary agreement. There, as here, a lease was contemplated, the details of which, aside from the essential terms, were manifestly to be agreed upon by the parties. But the court granted specific performance, despite the conjecture whether they would agree or not, and obviously reserved its equity powers to see to it that a lease was executed which faithfully carried out the main essentials, as agreed upon, and the intent of the parties so as to give fair force and effect to the primary obligation. We respectfully submit that the conclusion of the trial court, and the contention of counsel, that it may not be ascertained whether appellant would accept a tendered lease, and for this reason specific performance should be denied, find no support in the administration of equity. It is the function of equity to interpose its powers that discordant parties, in a matter of this kind, may be brought together upon the basis of fairness and justice.

APPELLEES' BROKEN PROMISE TO NEGOTIATE.

Confronted with the uncontradicted and highly important fact supported by the finding of the trial court (second sentence par. 13, Tr. 918), that appellees violated their written promise to negotiate, and precluded all possibility of negotiation, by suddenly repudiating the contract without good cause, they reply (1) (Br. page 7) that there was no valid contract. (2) That the court found there was no request for negotiation, and that, (3) as the appellant had a reasonable time and more for negotiation, and did not request it, "the defendants had an undoubted right on April 10, 1946, to treat the agreement as of no effect."

At this point (1), we again reiterate, with conviction, that the evidence and the findings of the trial court, undoubtedly establish a contract. It seems unnecessary here to repeat the argument or to amplify it.

As to point (2) and (3) if we understand the contention, it is urged that the fault of negotiations rests with appellant, because he had a reasonable time to negotiate, and not having done so, the appellees were justified in cancelling the contract. In a word, though the findings of the trial court (par. 13, page 918) established that no negotiation was requested by either party, the burden and fault must be placed upon the appellant, even though another finding of the trial court (many times repeated in our briefs) conclusively establishes that the appellees breached the agreement without good cause. No cross-appeal has

been taken here and we note no attempt on the part of appellees to disturb this finding. It can only mean that the appellees had no valid reason or justification for the breach and that it was purely and solely their fault. Further, the evidence conclusively shows that the appellant was led on in the belief he would get a lease, that the time element had long since been waived, the hotel was in process of construction, and as the finding indicates neither party was concerned about haste for further negotiation. But, aside from all this, it was the undoubted duty of the owner of the property to submit a lease for consideration. It was her grant of interest to a prospective tenant and the burden of approach was upon the appellees.

“The true rule independent of any usage on the subject, would seem to be that the party who was to execute and deliver a deed should prepare it.”

Willard v. Taylor, 19 L. Ed. 501, citation from page 505.

APPELLEES ESTOPPED FROM SETTING UP THEIR ADMITTED BREACH AS A DEFENSE TO SPECIFIC PERFORMANCE. THEIR REPLY TO THIS PRINCIPLE UNSUPPORTED BY THE EVIDENCE BY LAW OR EQUITY.

Appellees admit the rule “that a promisor shall place no obstacle in way of happening of a condition precedent; that where he prevents fulfillment of a condition precedent he cannot rely on such condition.” (Br. page 7.) Their answer to this is that the contract was incomplete. We have contended that the contract was complete as to its main essentials, which we again urge here; but even according to appellees’

theory, it only took further negotiation to complete it, and this the appellees arbitrarily and without good cause prevented. In preventing it, they violated their commitment and promise under the contract, and rely upon this breach and violation as a means of defeating the contract. This, under the authorities cited in our opening brief, they are estopped from doing. The case cited in appellees' brief, *O'Donnell v. Lebb*, 178 Pac. 212, 213, has no application because there the facts show a continuance of the time element, while here, the findings establish that the time element was waived. It seems pertinent to note here, in passing, that this cited case (page 213) announces a rule we are contending for here, that

“A court of equity, having before it the parties and the subject matter, may decree specific performance of a contract so far as the defaulting party can be made to perform.”

Appellees misquote finding 13 (Tr. page 918) of the trial court in asserting that the trial court found that the “breach” was “the fault of both parties”. (Br. page 5.) What the court found was “that the violation of the so-called time limitation in said agreement was the fault of both parties.” Nowhere in the findings has the trial court qualified its definite findings that the defendants repudiated the contract without good cause. The appellant by evidence and findings has been found blameless of fault for the broken contract.

Appellees contend that to invoke the doctrine of estoppel, prejudice and damage must arise. (Br. pages

5-7.) In support of this contention they refer to findings 5 and 7, which do not find that the plaintiff was not prejudiced or damaged. No. 5 states that the plaintiff was not requested by defendants to secure a loan, but that he did attempt to assist in procuring the loan. No 7 states that plaintiff did not sell another hotel at considerable or any sacrifice. The evidence conclusively shows that he disposed of his other hotel interest to devote his time and energies to the hotel in question here, to which he had every reason to believe he would get a lease. As we specifically set forth in our opening brief, he was cooperating with the defendants to that end. He was conferring with them, with the architect and builder, giving his time, travelling, spending his own money and part-performing in interviews with dealers for furnishing the hotel, which under the contract, he was obligated, in part, to do. He was losing interest returns on the \$10,000.00 deposit he put up on the basis of a good faith, which was betrayed. Such is an outline of the uncontradicted facts conclusively showing that this sudden repudiation pecuniarily prejudiced and damaged him. Further, because of his warranted reliance on the contract he had, his time and attention were diverted from any other possible business enterprises and were concentrated on the hotel lease in question which, he had every reason to believe, would be given him. In the face of these facts, which are supplemental to those stated in our opening brief, it seems clear that appellees are estopped from relying upon a defense founded upon their wilful and condemned repudiation of their contract without good cause.

APPELLEES' AUTHORITIES AND CITATIONS CONSIDERED.

A separate analysis of the authorities cited by appellees would be impossible within the page limitation of this brief. However, it may be generally and properly asserted that the basis of all authorities cited is that the evidence established that the parties did not intend the agreement to be binding. From the evidence disclosed by the record in this case, and as we have repeatedly urged, there seems to be no question but that the parties intended the agreement in evidence here to be a binding contract. Further, there is no support by cited authorities in appellees' brief that law or equity sanctions a party to an agreement, without regard to the rights of the other party, wilfully to violate his promise or obligation, and further to set up that violation as a defense against a suit for specific performance or, for that matter, against an action at law. None of the authorities cited encourage or condone such a brazen violation as we have here, and, we assert with confidence, none may be found.

Further, an examination and analysis of the authorities reveal that in a large majority of cases the courts stress the lack of "material" or "essential" terms in the contract as a reason for denying relief. An example of this is *St. Louis etc. v. Gorman*, 100 Pac. 647, 649, cited on page 18 of their brief, wherein the court among other things declares, "So, to be enforceable, a contract to enter into a future contract must specify all of its material and essential terms." But, as we have above indicated, none of these cases

refer to or pass upon a wilful violation of a contract for a lease, preliminary, contingent or otherwise, which denies to the other party the right of further negotiation, or any other right.

Appellees (Br. pages 40 and 46) refer to the leasing of the hotel garage as a matter to be adjusted by the lease and mutually agreed upon. It must be admitted that this manifestly is a minor matter and not a material or essential part of the contract. In fact, the wording of this paragraph (Tr. Vol. II, pages 911-912) expressly shows that it was a matter of indifference whether the garage was to be included in the lease or not. If it was, then the lessees were to pay 10% of the gross receipts, if it was leased to a third person the lessees of the hotel were to have the privilege of garage service for their guests on terms to be mutually agreed upon. It is quite apparent that either arrangement was satisfactory to all parties; and besides, it was a definite commitment as to what disposition by contract should be made of the garage. It is further evidence that the contract entered into was intended by the parties to be a contract for a lease, which appellees deny. It is also a striking illustration of how the appellant was denied further negotiation by the arbitrary action of the appellees, in refusing not only further to negotiate for the lease of the hotel, but for the garage.

We concede the highly discretionary powers of courts of equity. We are in accord with the salutary rule that fairness and justice are the controlling factors in equity jurisprudence. We believe, also,

that the appellant is amply justified in urging here the well established equitable maxim that "Equity regards as done that which ought to be done". (Assgnt. Error No. 12, Br. pages 13-14.) We believe that appellees who were committed by contract to further negotiate for a lease, should in equity be compelled to perform and that this honorable court, in conformity with equity, should regard as done that which ought to be done. That the decree of the trial court should be reversed and that the appellant should be given the remedy to which he is justly entitled.

Dated, Reno, Nevada,
December 26, 1947.

Respectfully submitted,
SAMUEL PLATT,
Attorney for Appellant.

No. 11,692

IN THE

**United States Circuit Court
of Appeals**

FOR THE
Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also
known as MRS. CHARLES W.
MAPES, CHARLES W. MAPES,
JR., GLORIA MAPES, and CHAS.
W. MAPES COMPANY (a co-
partnership,

Appellees.

PETITION FOR RE-HEARING

SAMUEL PLATT

Attorney for Petitioner-Appellant.

FILED

MAR 17 1948

PAUL P. O'BRIEN, CLERK

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PETITION FOR RE-HEARING

TO THE HON. THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT:

NOW COMES the above named Appellant, P. G.
DENSON, through his attorney, SAMUEL PLATT, and
respectfully petitions the above entitled Court for a re-

hearing herein, upon the following grounds and for the following reasons:

I.

The Court did not determine, by statement or analysis, an important question involved in the appeal, that is, as to whether a party to a written contract may wilfully violate and repudiate the contract without good cause and, as in this case, deprive the other party of a remedy either at law or equity.

II.

In adopting the decision and opinion of the trial Court, this Court established as the law of this Circuit that where a person by his contract charges himself with an obligation possible to perform, he need not perform it. It is believed that this was an inadvertence. The contract obligated the Appellees to negotiate with the Appellant for the additional terms to be incorporated in the lease. They repudiated this obligation without good cause. This Court has upheld them in this wilful violation.

III.

The Court has inadvertently established as the law of this Circuit that a party to a written contract for the lease of a building under construction and not a going business, who agrees upon the material and essential provisions of the lease,

who commits herself to perform under the contract, and who accepts Ten Thousand Dollars in cash from the other party as an evidence of good faith, may deliberately repudiate the contract without good cause and deprive the other party of any remedy whatever in law or equity in any American Court.

IV.

By adopting the trial Court's opinion and conclusions, it is believed that this Court inadvertently reached the inconsistent conclusion that though the Appellees breached the contract without good cause, and by their acts waived, refused and repudiated further negotiations, yet they were entitled to recover because the contract provided for further negotiations.

V.

The Court did not consider another important point involved in this appeal, that the contract is complete and definite in itself, that it contains no condition that it shall become definite, final or absolute only upon the happening of some future contingency, and that it is a contract *in praesenti*, for which the plaintiff was obligated to deposit, and did deposit, \$10,000.00 in cash as an evidence of good faith.

VI.

The Court did not pass upon or consider another important point raised on the appeal, namely, that though the contract

called for the formal and later execution of a lease, this did not negative the existence of the contract, the material and essential terms of which had been assented to and agreed upon.

VII.

The Court did not pass upon or consider another important point raised upon this appeal, namely, that the contract was definite and complete in all its material and essential terms; that it was the plain intention of the parties to be bound by these material and essential terms; that an agreement for a lease which contains the material and essential terms is enforceable in equity by specific performance; and that it was clearly the intention of the parties to embody in the lease only such subsidiary and customary provisions "to fully effectuate the intent and purposes of the parties" as definitely and completely agreed upon.

VIII.

The Court did not pass upon or consider another important point raised on this appeal, that the Appellees under the well recognized principle of equitable estoppel, were estopped from setting up their own wilful breach of the contract as a defense.

IX.

The Court did not pass upon or consider another important point raised in this appeal, namely, that the solemn promise

of the Appellees to negotiate was a condition precedent, which they may not set up as a defense in the face of their conceded wilful repudiation.

X.

The Court has in effect adopted the opinion of *Scholtz v. Northwestern, etc., Ins. Co.* (C. C. A. 8th) 100 F. 573, 574, which holds in part as follows:

“It may be conceded that an agreement to enter into a lease will neither be enforced in equity nor at law if it appears from the face of the agreement that any of the terms of the lease, *no matter how unimportant they may seem to be*, are left open to be settled by future conferences between the lessor and lessee.” (Italics supplied).

This opinion is contrary to the later conclusions in *Bondy v. Harvey* (2nd Circuit) 62 Fed. 2. 521, in which the Court found that although a lease was later contemplated by the parties “to the mutual satisfaction of the parties,” the contract was enforceable by specific performance.

Also in the case of *Adamson v. Alexander Milburn Co.* 275 Fed. 148 (C. C. A. 2) the Court in principle, reached the same conclusions, namely that though the contract was subject to a later agreement between attorneys, it could be specifically enforced by specific performance.

XI.

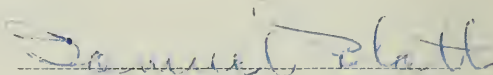
The Court did not consider or pass upon another important point raised in the appeal, namely, that the Supreme Court

of Nevada in the case of *Dondero v. Turrillas*, 59 Nev. 374, 94 P. 2nd. 276, the jurisdiction in which the contract was executed, held and established as the law of Nevada that a contract in which the parties have reached an agreement upon the essential terms may be enforced by specific performance.

XII.

The Court by analysis or opinion did not pass upon the specifications and assignments of error involved in this appeal, and particularly those specifications and assignments of error based upon the findings of fact of the trial Court.

WHEREFORE, Appellant respectfully petitions the Court for a re-hearing herein.

A handwritten signature in blue ink, appearing to read "Samuel Platt", written over a horizontal dashed line.

SAMUEL PLATT

Attorney for Petitioner-Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the Court and that it is not interposed for delay.

Dated, Reno, Nevada, March 15th, 1948.

A handwritten signature in blue ink, appearing to read "Samuel Platt", written over a horizontal dashed line.

SAMUEL PLATT
Attorney for Appellant.

